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In The

Supreme Court of the United States

October Term, 1982

THOMAS CRAIG, JR., and ORRIN T. LANKFORD,

Petitioners,

vs.

SIDNEY BARNEY, GREGORY WELSH, PHILLIP R. BROOKS, SEYMOUR BATES, ALVIN SHEFFIELD, CARLISS A. BATTS, ESTELLE G. EVANS, WILLIAM F. McCOY ELBERT L. PUGH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit erroneously abstain from reaching the merits of this case thereby barring the petitioners from the federal forum in which the vindication of federal constitutional rights was sought under 42 U.S.C. §1983?

2. Is the federal relief sought barred by the doctrine of res judicata?

3. Does the production of presumptively protected material under the First Amendment, pursuant to the subpoena power of the Virginia Special Grand Jury, constitute a prior restraint and "chill" on First Amendment rights?

4. Is the compelled production of presumptively protected materials by the Virginia Special Grand Jury violative of the Fifth Amendment when such production may tend to incriminate those compelled to produce the materials?

5. Is due process violated when the Special Grand Jury, pursuant to its subpoena power, compells the production of presumptively protected material prior to a determination on the question of obscenity?

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OPINION BELOW

On May 20, 1982, the United States Court of Appeals for the Fourth Circuit filed a published opinion affirming the decision of the United States District Court for the Eastern District of Virginia, at Richmond; the Honorable D. Dortch Warriner, District Judge presiding, abstaining from the consideration of the merits under the *Younger v. Harris* doctrine. The Court of Appeals found that the doctrine of federal abstention espoused in *Younger v. Harris* was applicable to the case and that Virginia's interest

in the unfettered operation of its grand jury system was an important state interest outweighing the alleged constitutional violations asserted by the petitioners. The Court of Appeals, therefore, did not reach the merits of the case.

It is from this decision that the petitioners file this timely petition for writ of certiorari requesting this Honorable Court to reverse and remand the decision entered below.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 20, 1982, and the judgment was thus final. The jurisdiction of this Court is invoked under Title 28 U.S.C.A. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Virginia Code Annotated §19.2-212 are set forth in the appendix.

STATEMENT OF THE CASE

This case came before the Circuit Court of Petersburg, Virginia with the Honorable Judge Oliver Pollard, Jr. presiding. He empaneled a Special Grand Jury, pursuant to the request of the regular grand jury for the April Term, to investigate instances of alleged prostitution in the adult bookstores of Petersburg, Virginia. The Special Grand Jury was composed of the same seven members of the grand jury which had previously heard testimony in a prostitution trial involving an alleged oral sex incident at an adult bookstore.

The foreman of the Special Grand Jury signed and issued a subpoena on May 22, 1981, summoning the petitioners to appear before the Special Grand Jury on May 29, 1981. It further required that the petitioners produce the following:

> 1. All books and records, including invoices, journals, ledgers, and cancelled checks, relating to the purchase of any publication which is offered for sale on the date this subpoena is issued.
>
> 2. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years preceding the date this subpoena is served.
>
> 3. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.
>
> 4. One copy of each and every book, magazine, pamphlet, or other publication which is offered for public sale on the date this subpoena is served.

In a letter to the petitioners, Mr. Gregory Welsh, Deputy Commonwealth Attorney for the City of Petersburg, Virginia, informed the petitioners that they must surrender the material inventoried by the police at the time of the inventory or produce the same before the grand jury. If the material was not accordingly surrendered, it would be seized. Consequently, petitioner Lankford surrendered all of the publications that were inventoried at the time of the actual inventory. Petitioner Craig refused to surrender any material alleging violations of his First, Fourth, Fifth and Fourteen Amendment rights.

At a Special Grand Jury hearing held on May 29, 1981, in the Circuit Court of Petersburg, the Honorable Oliver A. Pollard, Jr. ruled that the petitioners must appear before the Special Grand Jury as subpoenaed. At the special hearing, the petitioners filed a motion to quash the aforesaid subpoena. The Honorable Judge Oliver Pollard, Jr. set a hearing of this motion for June 22, 1981.

At the Special Grand Jury proceeding on May 29, 1981, petitioners Craig and Lankford asserted their rights under the Fifth Amendment to the United States Constitution, refusing to testify. Petitioner Craig also refused to produce tangible evidence. The foreman of the Special Grand Jury requested that the Deputy Commonwealth Attorney move that the petitioners be held in criminal contempt.

At the June 22, 1981 hearing on the motion to quash the aforementioned subpoena, the Honorable Oliver A. Pollard, Jr. ruled that petitioners could not be compelled to testify under the subpoena in that it failed to provide petitioners with adequate notice that the testimony would be required of them pursuant to the Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenas in question.

The Honorable Judge Oliver Pollard, Jr. also set a hearing on whether petitioners could be compelled to answer questions or produce documents under a new subpoena for June 30, 1981.

Judge Pollard indicated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to petitioners within a "reasonable amount of time."

Judge Pollard further requested that the Special Grand Jury submit questions it intended to ask petitioners to the court on June 30, 1981. At that time, the court ruled on whether the petitioners could assert their Fifth Amendment rights to any or all of the aforementioned questions.

At the subsequent hearing of June 30, 1981, the court again stated that the petitioners must produce the documents and magazines in question, pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury."

At the same hearing, the court "ruled . . . that the subpoena was invalid." Upon the strength of this conflicting ruling on the validity of the old subpoena and subsequent "voidness" of the proceedings before the Special Grand Jury, the court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the court, prior to the conclusion of the Special Grand Jury's investigation, in violation of Va. Code §19.2-212. The court then ruled separatedly and specifically on whether, compelling petitioners to answer any questions taken from that record, would violate petitioners Fifth Amendment rights.

The court, in conclusion, ordered petitioner Craig to produce the documents and magazines heretofore listed, pursuant to a subpoena issued July 31, 1981 at 9:00 a.m. The court further ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena issued upon petitioner Lankford. The court then ordered petitioner Lankford to produce the remaining documents and to testify pursuant to a then issued subpoena for July 31, 1981 at 9:00 a.m.

On July 9, 1981, the Special Grand Jury foreman issued a new subpoena to petitioner Craig. Petitioner Craig's subpoena

contained requests for the production of documents and magazines as listed in the old subpoena's issuance.

Subsequently, on July 9, 1981, the Special Grand Jury's foreman issued a new subpoena to petitioner Lankford. This subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, b, and c. Petitioner Lankford was not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite the "invalidation."

Consequently, on July 21, 1981, the petitioners filed a motion for a 42 U.S.C. §1983 action, along with a temporary restraining order, enjoining state Special Grand Jury proceedings. On July 24, 1981, a hearing was held on the motion in the United States District Court for the Eastern District of Virginia, Richmond Division. Accordingly, the motion was denied. On August 6, 1981, the petitioners filed an amended complaint for a preliminary injunction. Respondents filed a motion to dismiss on August 13, 1981 and petitioners responded on August 26, 1981. Respondents' motion to dismiss the amended complaint was granted on September 16, 1981 by the United States District Court Judge Dortch Warriner for the Eastern District of Virginia. An appeal was then filed by petitioners in the United States Court of Appeals for the Fourth Circuit on November 20, 1981.

Oral argument before the Court of Appeals was held on March 3, 1982. The Court of Appeals rendered its decision on May 20, 1982 affirming the decision of the United States District Court for the Eastern District of Virginia to abstain under the doctrine of *Younger v. Harris* and therefore did not reach the merits of the case. A petition for writ of certiorari was subsequently filed with this Honorable Court for a determination of the substantial constitutional issues presented.

HOW THE FEDERAL QUESTIONS WERE RAISED

The petitioners raised the deprivation of their constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments in their amended complaint before the United States District Court for the Eastern District of Virginia filed pursuant to 42 U.S.C. §1983, which is printed in the appendix at 7a. These issues were subsequently reraised on appeal to the United States Court of Appeals for the Fourth Circuit following the District Court's decision to abstain from reaching the merits of the case under the doctrine of *Younger v. Harris* which is printed in the appendix at 1a. The United States Court of Appeals, on May 20, 1982, affirmed the District Court's decision. The Court of Appeals' published opinion is reprinted in the appendix at 1a.

REASONS FOR GRANTING THE WRIT

Review by this Court is in the public interest and is desirable as it is necessary for this Court to resolve the conflicts created by the decision of the lower court in light of 42 U.S.C. §1983 and the serious constitutional issues raised in light of First, Fourth, Fifth and Fourteenth Amendment considerations.

I.

The doctrine of abstention is inappropriate when applied to bar the petitioners from access to the federal forum to vindicate federal constitutional rights under 42 U.S.C. §1983.

On May 20, 1982, the United States Court of Appeals for the Fourth Circuit rendered its decision in this case, holding that the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) was applicable and that the federal court must "refrain from hearing constitutional challenges to state action in certain circumstances

where federal intervention is regarded as an improper intrusion into the rights of a state to enforce its laws in its own courts."[1]

The petitioners submit to this Court that the Court of Appeals' reliance on *Younger* is misplaced, particularly in light of 42 U.S.C. §1983 which was created specifically to provide a federal forum in which to vindicate the violation of federal constitutional rights.

Recently, in *Patsy v. Florida Board of Regents*, No. 80-1874, 50 L.W. 4731 (1982), this Court, in considering whether exhaustion of state administrative remedies is required as a prerequisite to an action under 42 U.S.C. §1983, examined the legislative intent behind §1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor of §1983. In its examination of the congressional intent, the Court stated:

> "Many legislators [of the 1871 Congress] interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ('[t]he federal remedy is supplementary to the state remedy, and the latter need not be just sought and refused before the federal one is invoked')." 50 L.W. at 4733.[2]

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1. Decision, Case No. 81-6890, page 3.

2. "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights. . ." *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2141 at 2162 (1972). *See also, Judice v. Vail*, 430 U.S. 327 at 342 (dissent, Brennan, J.).

There is, therefore, a fundamental conflict between the congressional purpose and operation of 42 U.S.C. §1983 which is intended to "throw open the doors of United States Courts to individuals who were threatened with, or who had suffered the deprivation of constitutional rights." 50 L.W. at 4733, and the effect of *Younger, supra,* and its progeny which restricts access to the federal forum in situations where state proceedings are pending.

The court below, in rejecting the petitioners' argument that no state proceeding was pending since the Virginia Special Grand Jury has no power to issue indictments against the petitioners,[3] indicated that the petitioners were subject to the contempt power of the Virginia Circuit Court for failure to comply with the subpoenas requesting the production of materials contained within their stores.

The court's reliance on *Judice v. Vail,* 430 U.S. 327 (1977), is misplaced and distinguishable from the case at bar. In *Vail, supra,* the appellees were held in contempt by the New York state court. The Supreme Court, in considering whether federal interventions under 42 U.S.C. §1983 was consistent with the principles of *Younger* stated: "These principles apply to a case in which the State's contempt process is involved." *supra* at 335. In the case at bar, no contempt proceedings have commenced and therefore the process is not yet involved.[4]

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3. Va. Code §19.2-213-124 (1975).

4. Petitioner Lankford complied with the subpoena and surrendered the requested documents and materials and therefore would not be subject to the contempt jurisdiction of the Virginia Circuit Court.

To apply the principle espoused in *Vail, supra,* to this case is directly contrary to the congressional intent of 42 U.S.C. §1983 and requires the petitioners to violate the law prior to being afforded a forum, state or federal, in which to press their constitutional claims. Unlike the appellees in *Vail, supra,* the petitioners here have not "had an opportunity to present their federal claims in the state proceedings." *supra* at 337.

The petitioners here are in the posture of being placed between "the Scylla of intentionally flouting state law and the Charybdis of foregoing what [they] believe to be constitutionally protected activity. . ." *Steffel v. Thompson,* 415 U.S. 452 (1974). On the one hand, the Legislature has specifically enacted legislation affording access to the federal forum for the redress of constitutional grievances and on the other, the courts have expressly restricted such access. The petitioners have been subjected to continuing violations of First, Fourth, Fifth and Fourteenth Amendment guarantees based upon the conduct of the Virginia Special Grand Jury,

Currently, these petitioners have no forum in which to seek judicial redress. The petitioners submit to this Court that, under the circumstances herein presented, the better view of the effect of abstention was reflected by Mr. Justice Brennan in his dissenting opinion in *Judice v. Vail, supra.* In criticizing the doctrine of abstention in the name of federalism, Justice Brennan insightfully stated: "These decisions . . . have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated, *Paul v. Davis,* 424 U.S. 693 (1976) and systematic, *Rizzo v. Goode, supra,* violations of civil liberties." *supra* at 346.

The petitioners respectfully submit to this Honorable Court that the facts of this case clearly present circumstances indicating

a systematic violation of constitutional guarantees and unless the petitioners are permitted to proceed in the federal forum, their substantial federal claims cannot be vindicated.

II.

The federal relief sought is not barred by the doctrine of res judicata and collateral estoppel.

The doctrine of res judicata may be briefly stated as follows:

> "The doctrine of res judicata dictates that there be an end to litigation. '[I]t rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.' Commissioner v. Sunnen, 333 U.S. 591, 597 S.Ct. 715, 719 92 L.Ed. 898 (1948); however, res judicata serves as a bar to a subsequent litigation only when the prior judgment was returned by a court of competent jurisdiction, when the prior judgment was a final judgment on the merits, when the same parties and their privies are involved in both suits, when the two actions are based on the same issues and material facts and when the two proceedings present the same cause of action."

United States v. Mumford, 630 F. 2d 1023, 1027 (1980); *Allen v. McCurry*, 101 S. Ct. 411 (1980).[5] The doctrine of res judicata and collateral estoppel has been held to be fully applicable to the federal courts. *Allen v. McCurry, supra* at 414.

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5. *See also, Johnson v. United States*, 576 F. 2d 606 (5th Cir. 1978); *Gilbert v. Bagby*, 492 F. Supp. 714 (M.D.N.C. 1980).

The Court of Appeals for the Fourth Circuit in *Mumford, supra,* refused to invoke the doctrine of res judicata when the federal government instituted a criminal proceeding subsequent to having an issue determined adversely to it in a civil action. The court held that the "two proceedings [did] not present the same cause of action" and therefore held the doctrine of res judicata inapplicable, *supra* at 1027. The case before the Circuit Court of Petersburg was predicated upon a motion to quash a grand jury subpoena while the federal suit, filed under 42 U.S.C. §1983, alleges the deprivation of federal constitutional rights and seeks injunctive and declaratory relief. The distinction made in *Mumford, supra,* exists here. The state proceeding is essentially criminal in nature, while the federal suit under 42 U.S.C. §1983 is a civil case. Therefore, the doctrine of res judicata is inapplicable as separate causes of action exist.

The doctrine of res judicata and collateral estoppel are applicable only when the issues are directly determined, *United States v. Mumsingwear, Inc.,* 340 U.S. 36 (1949) or where the litigant had a " 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry, supra* at 415.

The record below reveals that the constitutional issues presented before the federal court were not directly determined and even though the petitioners' constitutional rights were raised before the Circuit Court, the court did not render any decision on those issues which precluded the petitioners from a "full and fair opportunity to litigate."[6]

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6. The Honorable Judge Oliver Pollard, Jr. of the Circuit Court of Petersburg merely upheld the validity of the issued subpoenas without comment as to the constitutional claims attempted to be raised.

The memorandum opinion of the United States District Court, per Judge Warriner, comments specifically on the respondents' refusal to raise the issue of res judicata and concedes that "the doctrine of res judicata . . . may be inapplicable to the case at bar."[7]

The doctrine of res judicata is therefore applicable only where a final judgment on the merits has been rendered. *United States v. Mumford, supra.* The Honorable Judge Pollard's denial of the petitioners' motion to quash is interlocutory and as such, is not a final judgment. *Alexander v. United States,* 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686 (1906); *Petition of Shelley,* 5 A. 2d 613 (1939).

In *Alexander v. United States, supra,* the Supreme Court held that an order from the Circuit Court requiring compliance with a subpoena duces tecum was not a final order and therefore not appealable. Mr. Justice McKenna, writing for the majority, stated:

> "I am of the opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence . . . is not a final decision; that it more appropriately is an interlocutory ruling . . ." *supra* at 122.

See also, New York Times Co. v. Jascalevich, 439 U.S. 301, 302 (1978); *United States v. American Telephone and Telegraph Co.,* 642 F. 2d 1285 (1980); *Catlin v. United States,* 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

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7. Memorandum Decision, 16 September 1981, p. 3.

The above authority requires that contempt proceedings be initiated before a defendant's right to appeal a court order for compliance ripens. To date, neither petitioner has been cited for contempt by the state Circuit Court and therefore the court order requiring compliance with the subpoenas remains interlocutory and non-appealable, thereby rendering the doctrines of res judicata and collateral estoppel inappropriate in this instance.

III.

The state Special Grand Jury has utilized its subpoena power to effect an impermissible prior restraint and a "chill" upon First Amendment rights.

The Special Grand Jury of the Circuit Court in Petersburg, Virginia, issued subpoenas to the petitioners requiring the production of books, magazines and business records contained in their respective establishments.[8]

The petitioners respectfully submit that the procedure utilized by the Special Grand Jury requiring the production of one copy of each book, magazine, pamphlet or other publication offered for public sale constitutes an impermissible prior restraint and a "chill" upon the rights guaranteed under the First Amendment.

The subpoenaed materials, books, magazines, pamphlets and all other publications contained within the petitioners' bookstores,

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8. The first subpoena was issued on May 22, 1981 and was subsequently held invalid as being overbroad on June 22, 1981. The court issued a second subpoena on July 7, 1981. In compliance with the first subpoena dated May 22, 1981, petitioner Lankford produced the requested material. Petitioner Craig refused to produce on First Amendment self-incrimination grounds. Following the invalidation of the subpoena dated May 22, 1981, the materials produced by petitioner Lankford were retained by the Special Grand Jury.

as well as the setting of the bookstores themselves, are presumptively protected under the First Amendment. *Roaden v. Kentucky,* 412 U.S. 505, 93 S. Ct. 2796, 2801 (1973); *Heller v. New York,* 413 U.S. 483, 489, 93 S. Ct. 2789 (1973); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S. Ct. 506, 611 (1968); *Freedman v. Maryland,* 380 U.S. 51 (1965).

In *Roaden v. Kentucky, supra,* this Court reasoned that an adult bookstore, as well as the materials contained within, warrant a higher degree of protection than that afforded ordinary contraband. In reversing and remanding the conviction of the defendant for exhibiting obscene material at a commercial theater, the Court stated:

> ". . . [t]he setting of the bookstore or commercial theater, each presumptively protected under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examined what is 'unreasonable' in light of the values of freedom of expression." 93 S. Ct. 2796 at 2801.

This presumption of protected expression requires that the trier of fact must "focus searchingly on the question of obscenity." *Heller v. New York, supra* at 488-489; *Marcus v. Search Warrant,* 367 U.S. 717, 732, 81 S. Ct. 1708 (1961). These protections were created by this Court to guard against encroachments by the state on freedom of expression, thereby "chilling" their exercise.

This Court has long held that state action, constituting a prior restraint upon the press or speech is strongly disfavored and is tolerated only in the most exigent circumstances. *Near v. Minnesota,* 283 U.S. 697 (1931); *New York Time Co. v. United States,* 403 U.S. 713 (1971); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 394 (1974). "Any system

of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The petitioners contend that the Special Grand Jury has not employed the "rigorous procedural safeguards" required to be "sensitive at all times to [the] production of First Amendment rights otherwise involved.'" *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); *Maguin v. Miller*, 433 F. Supp. 223 (1977) and that the Special Grand Jury has "chilled" the exercise of First Amendment rights.

The Special Grand Jury has subpoenaed one copy of all materials held for commercial sale by the petitioners. Even though only a single copy of each publication was subpoenaed, the Special Grand Jury has cast suspicion upon the material, thereby inducing the petitioners to reluctantly refrain from the further distribution of the subpoenaed materials, despite the fact that no determination on the issue of obscenity has been rendered by a neutral and detached magistrate. *Heller v. New York, supra; Miller v. California, supra.*

The subpoenaed materials are therefore still under the presumption of protected expression, as is the setting of the bookstores themselves, and until the material is deemed to be obscene, it is protected under the First Amendment. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972).

The Special Grand Jury is operating as an "ex parte" censor without employing the procedural safeguards necessary to

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9. *Miller v. California*, 413 U.S. 15 (1973).

effectively erode the presumption of protected expression. The petitioners are placed in a posture of uncertainty regarding the legality of the subpoenaed materials and until a determination on the issue of obscenity is made, if ever, the prior restraint and the "chill" on First Amendment rights is continuing as the petitioners are coerced into becoming self-censors and continuation of the grand jury practices will ultimately result in the closing of the petitioners' bookstores, thereby constituting an impermissible prior restraint. *Brockett v. Spokane Arcades, Inc., et al.*, No. 80-1604 (November 9, 1981).

This Court has consistently guarded the guarantees of the First Amendment from encroachment by the state and has mandated rigorous procedural safeguards to insure that this precious right is not "chilled" or restrained. The dissemination of printed materials and other forms of expression is to be considered one of our most zealously protected rights. The Special Grand Jury has effectively circumvented the procedural safeguards mandated by this Court to the detriment of the petitioners, thereby constituting a prior restraint and a "chill" on First Amendment rights.

IV.

The compelled production of presumptively protected materials by the Virginia Special Grand Jury when such production tends to incriminate those compelled to produce violates the Fifth Amendment.

The Fifth Amendment guarantee against compelled self-incrimination has long been held to extend absolute protection to an accused from being coerced by the state to be a witness against himself.

> "The object of the Amendment is to establish, in express language and upon firm basis, the general

> principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime." *Hale v. Henkel,* 201 U.S. 43 at 48 (1906).

The grand jury is a basic component of the criminal system and does not act as an independent investigatory body but is an arm of the prosecution. *United States v. Cleary,* 265 F. 2d 459, 461; *In re: Grand Jury Proceedings (Schofield),* 486 F. 2d 85 at 90.

The Special Grand Jury was empanelled to investigate possible criminal activity; any criminal activity which it uncovers is subject to possible prosecution. The Fifth Amendment erects a "zone of privacy" through which the government may not intrude and acts to protect the private papers which, if produced, would tend to incriminate the producer. *See Griswald v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Couch v. United States,* 409 U.S. 322, 43 S. Ct. 611, 34 L. Ed. 2d 548 (1972); *Bellis v. United States,* 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1975). The subpoenas issued by the Special Grand Jury were directed to the petitioners as individuals,[10] and not toward a corporate entity.

The requested materials are presumptively protected under the First Amendment[11] and would represent prima facie evidence of obscenity law violations if produced before the Special Grand Jury and a recommendation to the regular grand jury to indict the petitioners is accepted.

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10. Petersburg Transcript, June 22, 1981, p. 12.

11. *Rooden v. Kentucky, supra.*

The alleged violation of the petitioners' Fifth Amendment right against compelled self-incrimination is far from speculative in this case, as the material is permitted to "speak for itself" in an obscenity trial. Under the guidelines established in *Miller v. California, supra,* the state need only introduce the material alleged to be obscene in order to meet its burden at trial.[12] It is the material itself, supplied by those against whom it would be used, which could constitute substantially the entire evidentiary portion of the trial. Even though Va. Code Ann. §19.2-212 mandates that all evidence and transcripts of the Special Grand Jury proceedings be sealed and thereafter divulged only upon order of the court if the Special Grand Jury cites a witness with perjury, the Special Grand Jury's recommendation to the regular grand jury is predicated upon the evidence before it. In such an instance, the very material produced by the petitioners, presumptively protected material under the First Amendment, effectively forms the foundation of the prosecution's case.

The Fifth Amendment and the decisions of this Court do not require that self-incrimination occur prior to the application of the Amendment.

All that is required is that the testimony "tends" to incriminate.

> "The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, in other words, to give testimony *which may possibly expose him to a criminal charge.*" (Emphasis added.) *Hale v. Henkel, supra* at 49.

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12. Where the material is designed for a bizarre sexual group however, the state may be required to produce expert testimony in the area of prurient appeal. *Paris Adult Theater I v. Stanton,* 413 U.S. 49 at 56 n. 6 (1973); *United States v. Hamling,* 418 U.S. 87, 94 S. Ct. 2887 (1974).

To infer that the violation of the petitioners' Fifth Amendment rights is speculative because the Special Grand Jury cannot itself directly issue a criminal indictment when it is an initial stage of the Virginia criminal procedural process and no indictment has yet been issued, is to construe too narrowly the scope and purpose of the Fifth Amendment protection and this Court should hold that, under the circumstances herein presented, the compelled production of presumptively protected material is violative of the Fifth Amendment guarantee against compelled self- incrimination.

V.

The petitioners' due process rights have been violated by compelling the production of presumptively protected material pursuant to the subpoena power of the Special Grand Jury.

The Special Grand Jury in Virginia has subpoenaed one copy of "each and every book, magazine, pamphlet or other publication which is offered for public sale." This Court has consistantly required additional constitutional procedural requirements be met by the state before the distribution of presumptively protected material can be interrupted by the state. Mr. Justice Brennan, writing for the majority in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), stated:

> "It follows that, under the Fourteenth Amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regarding to the possible consequences for constitutionally protected speech." 367 U.S. at 731.

The seizure principle expressed above is fully applicable to grand jury proceedings as a seizure pursuant to a warrant and the deprivation pursuant to a subpoena both result in the

interference of the First Amendment freedom of expression. To maximize the protection afforded presumptively protected materials, procedures which interfere with distribution must be designed to ensure that non-obscene material is neither seized or its distribution halted prior to a determination that the material is obscene, and therefore outside of the protection of the First Amendment. The seizure process in *Marcus, supra,* was found to be defective because there was no "scrutiny by the judge of any materials considered by the complaint to be obscene." 367 U.S. at 732. The *Marcus* Court, therefore, mandated a "procedure . . . designed to focus searchingly on the question of obscenity" prior to any seizure or interference with presumptively protected material. 367 U.S. at 732. Further, the First Amendment imposes "a higher procedural requirement" to ensure against the curtailment of free expression. *Bantam Books, Inc. v. Sullivan,* 374 U.S. 58, 66, 83 S. Ct. 631, 9 L. Ed. 2d (1968); *Heller v. New York, supra; Roaden v. Kentucky, supra* at 504.

Miller v. California, 413 U.S. 15 (1973) sets out the test which must be applied by the trier of fact in determining the question of obscenity. Prior to such a determination, the material enjoys the protection of the First Amendment and its possession and distribution cannot be interfered with.

The procedural mandates in *Miller, Heller* and *Roaden,* have been consistantly upheld by this Court. *See Hamling v. United States, supra; Jenkins v. Georgia,* 418 U.S. 153 (1974); *Mishkin v. New York,* 383 U.S. 502 (1966). These mandated procedures require that a neutral or detached magistrate focus searchingly on the question of obscenity before even a single copy of a book or magazine can be retained by the state and its subsequent distribution halted.

The procedural device of a subpoena is being utilized here by the state as a de facto censoring mechanism without clearing

the "higher hurdle of reasonableness" required by this Court prior to state interference with the distribution of presumptively protected material. To permit the State of Virginia to effectively censor material protected by the First Amendment in this manner is to ignore the constitutional history created specifically to ensure the freedom of expression guaranteed under the First Amendment and procedural guarantees under the Fourteenth Amendment.

CONCLUSION

For the reasons herein stated, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit to determine the substantial constitutional issues created as a result of the decision. It is respectfully suggested that the decision of the court below is in conflict with the constitutional guarantees of the United States Constitution.

Respectfully submitted,

BURTON W. SANDLER
Attorney for Petitioners

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6890

Thomas Fletcher Craig, Jr., Orrin T. Lankford,

Appellants,

v.

Sidney Barney, Commonwealth's Attorney, City of Petersburg; Gregory Welsh, Asst. Commonwealth's Attorney; Phillip R. Brooks, Seymour Bates, Alvin Sheffield, Carliss A. Batts, Estelle G. Evans, William F. McCoy, Elbert L. Pugh, Special Grand Jury Members,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: March 3, 1982 Decided: May 20, 1982

Before HALL and SPROUSE, Circuit Judges and POTTER,* District Judge.

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* Honorable Robert D. Potter, United States District Judge for the Western District of North Carolina, sitting by designation.

Opinion of the United States Court of Appeals for the Fourth Circuit

Burton W. Sandler (Clarence B. Neblett, Jr.; Lawrence E. Blake on brief) for Appellants; Sidney Barney, Commonwealth's Attorney; Leslie Lindsey, Jr., Assistant Commonwealth's Attorney for Appellees.

SPROUSE, Circuit Judge:

Thomas F. Craig, Jr., and Orrin Lankford appeal the district court's dismissal of their amended complaint seeking to enjoin special state grand jury proceedings in Petersburg, Virginia. Since the district court, in ordering the dismissal, correctly relied on the abstention doctrine, we affirm.

Craig and Lankford, who manage adult bookstores in Petersburg, were summoned to appear before a special state grand jury on May 29, 1981, and to produce the following:

> 1. All books and records, including invoices, journals, ledgers, and cancelled checks relating to the purchase of any publication which is offered for sale on the date this subpoena is issued.
>
> 2. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years preceding the date this subpoena is served.
>
> 3. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.

> 4. One copy of each and every book, magazine, pamplet [sic], or other publication which of [sic] offered for public sale on the date this subpoena is served.

The appellants were informed that police would inventory all publications sold at their bookstores and that appellants could either surrender the subpoenaed material at the time of the inventory or produce it before the special grand jury. Lankford surrendered his records and one copy of each publication at the time of inventory, but Craig refused to do so. On May 29, the appellants moved to quash the subpoena and a hearing on this motion was held in Petersburg Circuit Court on June 22. The court ruled that the appellants did not have to testify because they had received inadequate notice, but that the portion of the subpoena which compelled the production of records and one copy of each publication was valid.

New subpoenas requiring the appellants to appear and testify were issued July 9; Craig's subpoena also required production of all items included in the original subpoena, while Lankford's subpoena excluded magazines which he had already produced.

On July 21, Craig and Lankford filed suit in federal district court to enjoin the special grand jury proceedings. Their motion for a temporary restraining order was denied. The appellants filed an amended complaint seeking a preliminary injunction on August 6, and the district court, invoking the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), dismissed the complaint on September 16.

Younger, of course, requires federal courts to refrain from hearing constitutional challenges to state action in certain

circumstances where federal judicial intervention is regarded as an improper intrusion into the rights of a state to enforce its laws in its own courts. 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction §4251 (1978). "A federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." *Samuels v. Mackell,* 401 U.S. 66 (1971).

The appellants first contend that dismissal by the district court was unwarranted because there was no pending state criminal prosecution. The appellants, however, view too narrowly both the facts in the case *sub judice* and the breadth of *Younger's* applicability. It is true, looking at the facts, that the appellants presently are not under indictment and that under Virginia law the special grand jury has no power to indict. Va. Code Ann. §19.2-191(2) (1981 Cum. Supp.). The appellants, however, are subject to the contempt power of the state court if they refuse to comply with the subpoena, and they therefore have access to a forum for the presentation of their constitutional defenses.

One rationale underlying the "pending prosecution" requirement is that the federal courts should not dismiss unless the state proceeding has reached a stage that assures the federal plaintiff an opportunity to present its constitutional defenses at some point during the on-going proceeding.

> [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless

> plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v. Thompson, 415 U.S. 452 (1974). In the case *sub judice*, appellants have the requisite opportunity to vindicate their constitutional rights. Also, contrary to appellants' suggestion, Virginia law appears to afford them other opportunities to challenge the constitutionality of the subpoenas even absent any grand jury indictment. The record is clear, however, that plaintiffs neither appealed the state circuit court's decision refusing to quash the subpoena nor sought a writ of mandamus to the Virginia Supreme Court of Appeals.

Turning to the breadth of *Younger's* applicability, the Supreme Court now has indicated that the doctrine bars any interference with the state's judicial process which creates an "offense to the State's interest" similar or equal to that created by interference with a state criminal proceeding. *Juidice v. Vail*, 430 U.S. 327 (1977). Virginia's interest in the unfettered operation of its grand jury system is as important as a state's interest in the operation of its contempt process, which the *Vail* court recognized as sufficient to invoke the *Younger* doctrine.

The appellants next argue that even assuming that *Younger* is theoretically applicable to these state proceedings, its use is inappropriate here since the seizure of their publications constituted a "chilling effect" on their first amendment rights which created the requisite "immediate irreparable injury" justifying federal equitable relief.

The short answer to this contention is that although the materials subpoenaed enjoy presumptive first amendment protection, there is no evidence, other than appellants' bald assertion, that the subpoena of one copy of each publication threatened to suppress or chill their first amendment rights. The judgment is, therefore, affirmed.

AFFIRMED.

AMENDED COMPLAINT FOR PRELIMINARY INJUNCTION, DECLARATORY DECREE, AND FOR RETURN OF UNLAWFULLY SEIZED PROPERTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NO:
JUDGE:

THOMAS FLETCHER CRAIG, JR.
2101 E. Washington Street
Petersburg, Virginia

and

ORRIN T. LANKFORD
2058 County Drive
Petersburg, Virginia

Plaintiffs

v.

SIDNEY BARNEY
Commonwealth's Attorney
Courthouse Hill
Petersburg, Virginia

and

GREGORY WELSH
Assistant Commonwealth's Attorney
Courthouse Hill
Petersburg, Virginia

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

and

PHILLIP R. BROOKS
Special Grand Jury Foreman
1044 Blair Road
Petersburg, Virginia

and

SEYMOUR BATES
Special Grand Jury Member
1917 S. Westchester Drive
Petersburg, Virginia

and

ALVIN SHEFFIELD
Special Grand Jury Member
1925 Cumberland Avenue
Petersburg, Virginia

and

CARLISS A. BATTS
Special Grand Jury Member
124 S. Dunlop Street
Petersburg, Virginia

and

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

ESTELLE G. EVANS
Special Grand Jury Member
425 Mistletoe Street
Petersburg, Virginia

and

WILLIAM F. McCOY
Special Grand Jury Member
816 Farmer Street
Petersburg, Virginia

and

ELBERT L. PUGH
Special Grand Jury Member
1646 LaMar Avenue
Petersburg, Virginia

Defendants

Serve Process On:
Phillip R. Brooks
Special Grand Jury Foreman
1644 Blair Road
Petersburg, Virginia

COUNT I

JURISDICTION

1. This action seeks a preliminary injunction and permanent injunction to restrain the Defendants and their agents,

representatives, employees, assigns and successors and anyone acting in concert with them, from obstructing, hindering or otherwise interfering with Plaintiffs' rights under the *Constitution of the United States.*

2. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

3. This action arises under the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and this Court has jurisdiction under 28 U.S.C. 1331. Jurisdiction is further based on 28 U.S.C. 1343, as this is an action to secure equitable relief for the protection of Plaintiffs' civil rights pursuant to *42 U.S.C. 1983*. Plaintiffs also seek a declaratory judgment under *28 U.S.C. 2201 and 2202*, declaring the Special Grand Jury proceeding unconstitutional as applied to Plaintiffs and in its threatened application.

4. Suit is further founded on *28 U.S.C. Section 1343(4)* "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . as well as *Article III, Section 2* of the *Constitution of the United States.*"

5. Prayer for Declaratory relief is founded on *Rule 57* of the Federal Rules of Civil Procedure, as well as *28 U.S.C. Section 2207.*

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT II

PARTIES

7. Plaintiffs are involved in the operation of adult bookstores that make available to the adult public material that is "presumptively protected" under the *First Amendment* to the *United States Constitution*.

8. Defendants are a Special Grand Jury of Petersburg, Virginia and the Commonwealth's attorney for Petersburg, Virginia, acting through his deputy attorney, all citizens and residents of the Commonwealth of Virginia.

COUNT III

FACTUAL ALLEGATIONS AND OVERT ACTS

9. The Honorable Oliver A. Pollard, Jr., Judge of Circuit Court of Petersburg, Virginia, impaneled a Special Grand Jury at the request of the regular Grand Jury for the April term, to investigate incidents of alleged prostitution in the adult bookstore of Petersburg, Virginia. This Special Grand Jury consists of the same seven (7) persons as the Grand Jury which had heard testimony pursuant to a prostitution trial involving an alleged oral sex incident at an adult bookstore.

10. A Subpoena issued and signed by the Foreman of the Special Grand Jury on May 22, 1981, summoned the Plaintiffs to appear before this Special Grand Jury on May 29, 1981, and required Plaintiffs' presence and the production of the following:

a. All books and records, including invoices, journals, ledgers and cancelled checks relating to the purchase of any publication which is offered for public sale on the date this subpoena is served.

b. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years precceding the date this subpoena is served.

c. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.

d. One copy of each and every book, magazine, pamphlet or other publication which is offered for public sale on the date this subpoena is served.

11. Concurrent with the subpoena, Mary Gregory Welsh, Deputy Attorney for the City of Petersburg, Virginia, wrote to Plaintiffs informing Plaintiffs that the exact contents of any testimony they may give at the Special Grand Jury proceeding cannot be divulged, unless the Plaintiffs were subsequently prosecuted for perjury.

12. The Deputy Attorney did not inform Plaintiffs that the Special Grand Jury would subsequently report to the Circuit Court of Petersburg, Virginia, the findings of its investigation and make recommendations to the Circuit Court, which though sealed, would with Court order, be open to public inspection and could result in bills of indictment before a regular Grand Jury for alleged criminal offenses. *Va. Code §19.2-213, §19.2-214.*

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

13. The Commonwealth's Deputy Attorney also informed Plaintiffs that an officer would inventory all retail publications offered for public sale at the Plaintiffs' place of employment.

14. In the letter aforementioned, and pursuant to the subpoenaes aforementioned, Plaintiffs were told that they could surrender the material inventoried by the police at the time of the inventory or produce the same before the Grand Jury. If the materials were not so provided, the same would be seized.

15. Plaintiff Lankford surrendered all of the publications inventoried at the time the inventory was made. Plaintiff Craig refused to do so on *First*, *Fourth*, *Fifth* and *Fourteenth Amendment* grounds.

16. The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, held, at a special hearing on May 29, 1981, that Plaintiffs must appear before the Special Grand Jury, as subpoenaed. At this special hearing, Plaintiffs filed a Motion to Quash the aforementioned subpoena, and the Honorable Oliver A. Pollard, Jr., set a hearing on this Motion for June 22, 1981.

17. At the Special Grand Jury proceeding on May 29, 1982, Plaintiffs Craig and Lankford asserted their rights under the *Fifth Amendment* to the *United States Constitution*, refusing to testify. Plaintiff Craig also refused to reproduce tangible evidence. The Foreman of the Special Grand Jury requested the Deputy Commonwealth Attorney move the Circuit Court that the Plaintiffs be held in contempt.

18. On June 22, 1981, at the hearing on the Motion to Quash the aforementioned subpoena, the Honorable Oliver A. Pollard,

Jr. ruled that Plaintiffs could not be compelled to testify under the subpoena in question, as it failed to provide Plaintiffs with adequate notice that testimony would be required of them, under Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenaes in question. *Transcript 2 (p. 18)*

19. The Honorable Oliver A. Pollard, Jr. also set a hearing on whether Plaintiffs could be compelled to answer questions or produce documents under a new subpoena for June 30, 1981. *Transcript 1 (p. 54)*

20. Judge Pollard stated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to Petitioner within a "reasonable amount of time." *Transcript 1 (p. 58)*

21. Judge Pollard also requested that the Special Grand Jury submit questions it intended to ask Plaintiffs to the Court on June 30, 1981. At that time, the Court would rule on whether Plaintiffs could assert their *Fifth Amendment* rights to any or all of the aforementioned questions.

22. At the subsequent hearing on June 30, 1981, the Court again stated that Plaintiffs must produce the documents and magazines in question pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury." *Transcript 2 (p. 10)*

23. Later in the same hearing, however, the Court "ruled . . . that the subpoena was invalid." (p. 18). Upon the strength

of this conflicting ruling on the validity of the old subpoena, and subsequent voidness of the proceedings before the Special Grand Jury, the Court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the Court, prior to the conclusion of the Special Grand Jury's investigation, in violation of *Va. Code §19.2-212*. The Court then ruled separately and specifically on whether compelling Plaintiffs to answer any question taken from that record would violate Plaintiffs' *Fifth Amendment* rights.

24. The Court, in conclusion, ordered Plaintiff Craig to produce the documents and magazines heretofore listed pursuant to, an as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m. The Court also ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena upon Plaintiff Lankford and ordered him to produce the remaining documents and to testify pursuant to an as yet unissued new subpoena for July 31, 1981 at 9:00 a.m.

25. On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Petitioner Craig. Petitioner Craig's subpoena contained requests for the production of documents and magazines as listed on the old subpoena's parts a, b, c and d but referring only to the date of the new subpoena's issuance.

26. On July 9, 1981, the Speical Grand Jury's Foreman issued a new subpoenae to Petitioner Lankford. Plaintiff Lankford's subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, b, and c. Plaintiff Lankford is not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite its "invalidation."

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT IV

OVERT ACTS

27. The Defendants are coercing Plaintiffs into giving evidence that may lead to their own prosecution. Specifically, Plaintiffs have been, or are being, forced to produce magazines and documents which belong to them and/or are in their possession, in violation of Plaintiffs' rights under the *Fifth Amendment* to the *United States Constitution*. Such evidence can serve as on the basis of criminal indictments against Plaintiffs. Thus, Plaintiffs are confronted with real, immediate and irreparable injury, unless their constitutional rights can be vindicated.

28. The Defendants have, or are, coercing Plaintiffs into surrendering a massive quantity of books and magazines that are presumptively protected under the *First Amendment* to the *United States Constitution* without a showing of necessity or materiality whatsoever. Whereas, the *Fourth Amendment* to the *Constitution of the United States* provides protection against a Grand Jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable and this particular subpoena duces tecum treads upon *constitutionally protected freedoms* under the *First Amendment*, the subpoenaes in question are unduly broad and effect an unreasonable search and seizure in violation of Plaintiffs' Fourth and *First Amendment* rights and inflicting real, immediate and irreparable injury upon Plaintiffs.

29. The Defendants have denied Plaintiff Lankford of due process of law by invalidating the original subpoena duces tecum at the hearing on June 30, 1981 and releasing the record of

proceedings under the old subpoena, but holding a quantity of Plaintiff's magazines and books under power and comulstion of the earlier, invalidated subpoena. These books were seized on May 22, 1981. Despite this "invalidation" some books are still being held under the old subpoena, with Court sanction, effecting a "chill" on Plaintiffs' *First Amendment* rights and a denial of due process.

30. The Defendants have denied Plaintiffs due process and equal protection of law by releasing for Court inspection, a record containing questions and statements given at a Special Grand Jury proceeding, in violation of *Va. Code §19.2-212*, prior to the conclusion of the Special Grand Jury's investigation.

31. The Defendants have denied Plaintiffs due process of law by randomly and illogically applying the law of the Commonwealth of Virginia in enforcing the subpoenaes of Plaintiffs and their tangible evidence. Specifically, the Commonwealth concedes that *Va. Code Rule 3A:15* applies to a subpoena before a Special Grand Jury, but that mandatory language of that section, requiring authorization of that subpoena by court order, is unapplicable. Resultingly, the Commonwealth has inconsistently applied that section, denying Plaintiffs equal protection and due process of the law.

32. The complained of actions, conduct and behavior of Defendants have effected, or will effect, a prior restraining of Plaintiffs' *First Amendment* rights, by taking a massive quantity of magazines and books for an indefinite amount of time. Such a seizure will do immediate and irreparable harm to Plaintiffs by effecting a "chill" on Plaintiffs' *First Amendment* rights.

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

33. The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Subsequently, Plaintiffs cannot assert their constitutional rights in a single state proceeding. Likewise, Plaintiffs have presented, in Motions to Quash the subpoena in question and in Memorandums in Support of Motions, their claims for constitutional relief, which have been rejected by the Circuit Court in Petersburg, in its interlocutory decrees. These decrees, interlocutory in nature, are not appealable; thus, Plaintiffs' rights cannot be vindicated in any ongoing single state proceeding. Therefore, as irreparable injuries and damages to Plaintiffs' constitutional rights are both great and immediate and cannot be vindicated in any single state proceeding, Plaintiffs' only recourse to restrain further violation of constitutional guarantees, is in this federal forum.

34. The acts, conduct and behavior of Defendants effecting a prior restraint of Plaintiffs' *First Amendment* rights, evidence an intention on the part of Defendants to use the subpoena mechanism of the Special Grand Jury to seize an excessive number of Plaintiffs' presumptively protected magazines, harass Plaintiffs in their business activities and induce Plaintiffs into closing their stores. By attempting to intimidate and stop Plaintiffs from engaging in their businesses by means of the Special Grand Jury mechanism and the real threat of criminal prosecution, defendants have engaged in *bad faith* enforcement of the law, entitling Plaintiffs to injunctive relief from such enforcement under *42 U.S.C. 1983*.

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT V

DEPRIVATION OF CONSTITUTIONAL RIGHTS PRIVILEGES AND IMMUNITIES UNDER COLOR OF STATE LAW

35. Plaintiffs incorporate by reference and reallege the contents of Paragraphs 1 through 34 above.

36. *This cause of action arises under the United States Constitution and under 42 U.S.C. 1983.*

37. Each and all of the acts of Defendants alleged in Paragraphs 1 through 34 above were done by Defendants, not as individuals, but under the color and pretense of the statutes of the Commonwealth of Virginia, and under the alleged authority of their respective offices and duties.

38. The conduct of Defendants deprived Plaintiffs of the following rights, privileges and immunities secured to them by the *Constitution of the United States*:

a. The right of Plaintiffs under the *First and Fourteenth Amendments.*

b. The right of Plaintiffs to be secure in person and effects against unreasonable search and seizure under the *Fourth and Fourteenth Amendments.*

c. The right of Plaintiffs to refuse to incriminate themselves or give evidence which may tend to lead to their criminal prosecution, either by testimony or by an unlawful search and seizure under the *Fourth, Fifth and Fourteenth Amendments.*

d. The right of Plaintiffs not to be deprived of life, liberty or property without due process of law, and the right to equal protection of the laws, secured by the *Fifth* and *Fourteenth Amendments*.

The acts, conduct and behavior of Defendants entitle Plaintiffs to compensatory damages and to declaratory and equitable relief as set forth hereafter.

RELIEF SOUGHT

WHEREFORE, Plaintiffs respectfully pray the Court as follows:

1. That this Court on Motion of Plaintiffs after hearing issue a preliminary and permanent injuction enjoining all Defendants, their agents and/or employees from future violations of Plaintiffs' *First, Fourth, Fifth* and *Fourteenth Amednment* rights. This request includes, but it is not limited to, the following:

a. Enjoin the Court from compelling the reproduction of any documents or magazines before the Special Grand Jury and order that any documents or magazines taken pursuant to earlier invalidated subpoenas be return immediately.

b. Enjoin any and all prosecution of Plaintiff Lankford based on evidence turned over by him under coercion of the earlier, invalidated subpoenas.

c. Enjoin the Special Grand Jury, as now empanelled, from any further proceeding for having released records of its proceedings prior to the conclusion of its investigation in violation

of Va. Code §19.2-212, denying Plaintiffs equal protection and due process of law.

d. Plaintiffs request that this Court enter a declaratory decree pursuant to *28 U.S.C. Section 2201 and 2202* to the effect that the Special Grand Jury proceeding is being unconstitutionally applied to Plaintiffs in light of Plaintiffs' *First, Fourth, Fifth* and *Fourteenth Amendment* rights because of unconstitutional interlocutory decrees and the conduct of the Defendants.

e. Plaintiffs further request that this Court award Plaintiffs their attorneys' fees and court costs in accordance with *42 U.S.C. 988* and such other relief as the Corut deems just and proper.

JURY TRIAL DEMAND

Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury, on all issues.

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Plaintiffs

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

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MOTION FOR TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THOMAS FLETCHER CRAIG, JR., *et al*,
Plaintiffs

v.

SIDNEY BARNEY, *et al*,
Defendants

TO THE HONORABLE
THE JUDGE OF SAID COURT:

Plaintiffs, by and through their attorney, Burton W. Sandler, Esquire, or Counsel, and Clarence B. Neblett, Jr., Esquire, complaining of the Defendants, moves this Honorable Court under the provisions of *Rule 65(b)* of the *Federal Rules of Civil Procedure*, enjoining Defendants Sidney Barney, Commonwealth's Attorney, Gregory Welsh, Assistant Commonwealth's Attorney, Phillip R. Brooks, Special Grand Jury Foreman, Seymour Bates, Special Grand Jury Member, Alvin Sheffield, Special Grand Jury Member, Carliss A. Bates, Special Grand Jury Member, Estelle G. Evans, Special Grand Jury Member, William F. McCoy, Special Grand Jury Member, and Filbert L. Pugh, Special Grand Jury Member from:

(a) compelling or in any way requiring the production of any documents, books, or magazines before the Special Grand Jury pursuant to any subpoena

(b) witholding any books or magazines taken pursuant to any invalidated or otherwise illegal subpeona

(c) innitiating any criminal prosecution of Plaintiff Lankford based on evidence turned over by him under coercion of an invalidated or otherwise illegal subpeona

(d) any further investigations by the Special Grand Jury pending a declaratory decree under *28 U.S.C. 2201* and *2202* as to the legality of that investigatory body's further impanelment for having willfully and wantonly violated *Va. Code §19.2-212*, the law of the body's creation, and having further violated Plaintiff's right to equal protection and due process of law under the *Fifth* and *Fourteenth Amendments* to the *United States Constitution*.

If the Defendants are not so ordered and enjoined immediately, irreperable, severe and immediate harm will result to Plaintiffs, and the same Plaintiffs will be deprived of rights secured to them by the *First*, *Fourth*, *Fifth*, and *Fourteenth Amendments* to the United States Constitution, as more particularly described in the Memorandum in Support of Plaintiffs Motion for Temporary Restraining Order, and other exhibits attached hereto, and filed herewith.

If the Temporary Restraining Order be issued as prayed, the injury to the Defendants, if any injury at all, will be so slight that only a token bond covering costs of this proceeding is required under *Rule 65(c)* of the *Federal Rules of Civil Procedure*.

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Plaintiffs must resort to this Court to vindicate their Constitutional rights. The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Consequently, Plaintiffs cannot assert their Constitutional rights in an ongoing state proceeding, as they are not prisoners at bar. Likewise, Plaintiffs have presented, in *Motions to Quash* the subpoenaes in question, and in *Memorandums in Support of Motion to Quash* the subpoenaes in question, their claims for constitutional relief, which have been denied by the Circuit Court of Petersburg, Virginia. As the Circuit Court's decrees are interlocutory, they are not appealable. Thus, Plaintiffs rights cannot be vindicated, before immediate harm and injury is done to Plaintiffs, in any ongoing single state proceeding.

The undersigned attorneys for Plaintiffs avers that the herein named Defendants are aware that a complaint has been filed in this Court on , July , 1981 at .M. and have been advised that, because of their subsequent activity, and attempt will be made to move for a *Temporary Restraining Order* and said Defendants have been provided, through their counsel, with copies of the pleadings herein. The undersigned attorneys further aver that the Defendants have been requested to appear in person or through their counsel, at the time that a *Temporary Restraining Order* will be requested.

Respectfully submitted,

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Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No.

JUDGE:

THOMAS FLETCHER CRAIG, JR., et al.,

Plaintiffs

v.

SIDNEY BARNEY, et al.,

Defendants

Plaintiffs herein respectfully submit to this Honorable Court this Memorandum in Support of Motion For Temporary Restraining Order heretofore filed with this Honorable Court.

FACTS

The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, impaneled a Special Grand Jury at the request of the regular Grand Jury for the April term, to investigate incidents of alleged prostitution in the adult bookstores of Petersburg, Virginia. This Special Grand Jury consists of the same seven (7) persons as the Grand Jury which had heard testimony pursuant to a prostitution trial involving an alleged oral sex incident at an adult bookstore.

Memorandum in Support of Motion for Temporary Restraining Order

A subpoena issued and signed by the Foreman of the Special Grand Jury on May 22, 1981, summoned the Plaintiffs to appear before this Special Grand Jury on May 29, 1981, and required Plaintiffs presence and the production of the following:

> a. All books and records, including invoices, journals, ledgers and cancelled checks relating to the purchase of any publication which is offered for public sale on the date this subpoena is issued.
>
> b. All books and records, including tax returns, information returns, journals and ledger relating to gross sales in the two years preceeding the date this subpoena is served.
>
> c. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.
>
> d. One copy of each and every book, magazine, pamphlet or other publication which is offered for public sale on the date this subpoena is served.

Concurrent with the subpoena, Mr. Gregory Welsh, Deputy Commonwealth Attorney for the City of Petersburg, Virginia, wrote to Plaintiffs informing Plaintiffs that the exact contents of any testimony they may give at the Special Grand Jury proceeding cannot be divulged, unless the Plaintiffs were subsequently prosecuted for perjury.

Memorandum in Support of Motion for Temporary Restraining Order

The Deputy Attorney did not inform Plaintiffs that the Special Grand Jury would subsequently report to the Circuit Court the findings of its investigation and make recommendations to the Circuit Court, which though sealed, would, with Court order, be open to public inspection and could result in bills of indictment before a regular Grand Jury for alleged criminal offenses. *Va. Code §19.2-213, §19.2-214.*

The Commonwealth's Deputy Attorney also informed Plaintiffs that an officer would inventory all retail publications offered for public sale at Plaintiffs' place of employment.

In the letter aforementioned, and pursuant to the subpoenaes aforementioned, Plaintiffs were told that they could surrender the material inventoried by the police at the time of the inventory or produce the same before the Grand Jury. If not, the same would be seized.

Plaintiff Lankford surrendered all of the publications inventoried at the time of the inventory. Plaintiff Craig refused to do so on *First, Fourth, Fifth* and *Fourteenth Amendment* grounds.

The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, held, at a special hearing on May 29, 1981, that Plaintiffs must appear before the Special Grand Jury, as subpoenaed. At this special hearing, Plaintiffs filed a Motion to Quash the aforesaid subpoena. The Honorable Oliver A. Pollard, Jr. set a hearing of this Motion for June 22, 1981.

At the Special Grand Jury proceeding on May 29, 1981, Plaintiffs Craig and Lankford asserted their rights under the *Fifth*

Amendment to the *United States Constitution,* refusing to testify. Plaintiff Craig also refused to produce tangible evidence. The Foreman of the Special Grand Jury requested that the Deputy Commonwealth Attorney move the Court that the Plaintiffs be held in criminal contempt.

On June 22, 1981, at the hearing on the Motion to Quash the aforementioned subpoena, the Honorable Oliver A. Pollard, Jr. ruled that Plaintiffs could not be compelled to testify under the subpoena in question, as it failed to provide Plaintiffs with adequate notice that testimony would be required of them, under Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenaes in question. Transcript 2 (p. 18).

The Honorable Oliver A. Pollard, Jr. also set a hearing on whether Plaintiffs could be compelled to answer question or produce documents under a new subpoena for June 30, 1981. *Transcript 1 (p. 54).*

Judge Pollard stated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to Plaintiff within a "reasonable amount of time." *Transcript 1 (p. 58).*

Judge Pollard also requested that the Special Grand Jury submit questions it intended to ask Plaintiffs to the Court on June 30, 1981. At that time, the Court would rule on whether Plaintiffs could assert their *Fifth Amendment* rights to any or all of the aforementioned questions.

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At the subsequent hearing on June 30, 1981, the Court again stated that Plaintiffs must produce the documents and magazines in question pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury." *Transcript 2 (p. 10).*

Later in the same hearing, however, the Court "ruled . . . that the subpoena was invalid." (p. 18). Upon the strength of this conflicting ruling on the validity of the old subpoena and subsequent "voidness" of the proceedings before the Special Grand Jury, the Court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the Court, prior to the conclusion of the Special Grand Jury's investigation, in violation of *Va. Code* §19.2-212. The Court then ruled separately and specifically on whether compelling Plaintiffs to answer any questions taken from that record would violate Plaintiffs' *Fifth Amendment* rights.

The Court, in conclusion, ordered Plaintiff Craig to produce the documents and magazines heretofore listed pursuant to and, as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m. The Court also ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena upon Plaintiff Lankford and ordered him to produce the remaining documents and to testify pursuant to an, as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m.

On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Plaintiff Craig. Plaintiff Craig's subpoena contained requests for the production of documents and magazines as listed in the old subpoena's parts a, b, c and d, but referring only to the date of the new subpoena's issuance.

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On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Plaintiff Lankford. Plaintiff Lankford's subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, c and c. Plaintiff Lankford is not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite its "invalidation."

I.

PLAINTIFFS MUST RESORT TO A FEDERAL COURT TO VINDICATE THE VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Generally, a Federal Court will not intervene in an ongoing state proceeding. *Younger v. Harris,* 401 U.S. 37 (1971).

However, one may resort to Federal Courts to enjoin a state proceeding where immediate, irreparable and real injury is alleged and Plaintiffs' rights cannot be vindicated in any ongoing single state proceeding. *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

Plaintiffs herein must resort to this Federal forum to vindicate their constitutional rights.

The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Subsequently, Plaintiffs cannot assert their constitutional rights in any ongoing state criminal proceeding.

Likewise, Plaintiffs have presented, in Motions to Quash subpoenaes in question and in Memorandum in Support of

Motions, their claims for constitutional relief, which have been rejected by the Circuit Court of Petersburg, Virginia.

As the Court's decrees are interlocutory and not appealable, Plaintiffs' rights cannot be vindicated, before immediate and irreparable harm and injury herein alleged is done to Plaintiffs in any ongoing single state proceeding.

II.

REQUIRING PETITIONERS TO PRODUCE PRIVATE BOOKS AND RECORDS THAT WOULD INCRIMINATE THEM CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE AND VIOLATES PLAINTIFFS' FIFTH AMENDMENT RIGHTS.

The *Fifth Amendment* generally protects individuals from coercion to prove a charge against themselves "out of [their] own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1963). It is uncontroverted, both in law and in the Commonwealth, that Plaintiffs have *Fifth Amendment* rights before the Special Grand Jury.

The *Fifth Amendment* applies to the production of documents, as well as to testimony.

> "[U]nreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, throws light on the question as to what is an

Memorandum in Support of Motion for Temporary Restraining Order

> "unreasonable search and seizure. . .' And we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States,* 116 U.S. 616, 663.

Clearly, a mechanism exists whereby the production of documents in question and the subsequent report by the Special Grand Jury could result in criminal prosecution of Plaintiff. Va. Code §19.2-213, §19.2-214.

While a corporation has no *Fifth Amendment* rights, *Oklahoma Press Publishing Co. v. Wallings,* 329 U.S. 186 (1946), a Grand Jury cannot require the production by a person of *private books and records* that would incriminate him. *U.S. v. Dionisio,* 410 U.S. 1, 12 (1972).

In Plaintiff Lankford's case, all of the books and records in question are privately owned by him.

In Plaintiff Craig's case, the subpoenaes are addressed to Craig as an individual, not to any corporation. Thus, all records or documents taken by the Special Grand Jury pursuant to this subpoena are considered personal to Plaintiff Craig.

Wherefore, both Plaintiffs should be allowed to assert *Fifth Amendment* rights not to present books or records that would incriminate Plaintiffs. Likewise, Plaintiffs cannot be compelled to produce books or records that would lead to prosecution or lead to other evidence used in prosecution of Plaintiffs. *Kastigar v. U.S.,* 406 U.S. 441, 453 (1972).

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III.

THE SUBPOENA IN QUESTION IS UNDULY BROAD, CONSTITUTING AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF PETITIONERS' FOURTH AND FIRST AMENDMENT RIGHTS.

A subpoena duces tecum can effect a search and seizure.

> "While a search ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case,* the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, *be he individual or corporation,* is entitled to protection. (emphasis mine). *Hale v. Henkel,* 201 U.S. 43, 76 (1906).

The *Fourth Amendment* provides protection against a Grand Jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable. *U.S. v. Dionisio,* 410 U.S. 1, 12-13, *Hale v. Henkel,* 201 U.S. at 77.

The scope of this subpoena is surely broad enough to be characterized as "sweeping." As the Supreme Court so aptly states:

> "[I]ndeed, it is difficult to say how its business could be carried on after [Petitioners] had been denied of this mass of material, which is not shown to be necessary in the prosecution of this case [or

> the investigation at hand], and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena.

The Court continues:

> [S]ome necessity should be shown, either from an examination of the witness orally, or from the known transaction of these [bookstores] with other companies implicated or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Hale v. Henkel,* 201 U.S. at 77.

By requiring the production of this material before the Special Grand Jury, Plaintiffs are being coerced into surrendering a massive quantity of books and magazines without any showing of materiality or necessity whatsoever. The unduly broad subpoenaes in question, thus, effect an unreasonable search and seizure.

The books and records subpoenaed are presumptively protected by the *First Amendment,* and must be proven at a prior adversarial hearing or before a neutral and detached judicial officer to be contraband, *Heller v. New York,* 413 U.S. 483 (1973); *Freedman v. Maryland,* 380 U.S. 51 (1964); *Bantam Books v. Sullivan,* 372 U.S. 58 (1961); *McKinney v. Alabama,* 429 U.S. 669, 678 (1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561 (1975).

Memorandum in Support of Motion for Temporary Restraining Order

Where such a quantity of papers and books are requested for production, the burden of proving materiality already rests with the Special Grand Jury. That burden must be forthrightly met when they tread upon constitutionally protected freedoms and demand the production of presumptively protected materials; otherwise, such a taking can only effect a constitutionally forbidden "prior restraint" on the right to free expression. In this instance, the securing of magazines and books in so massive a quantity has clearly put a "chill" on Plaintiff Lankford's *First Amendment* rights. Unless this Court enjoins the enforcement of said subpoenaes, Plaintiff Craig's rights under the *First* and *Fourth Amendments* to the *United States Constitution* will also be severly and indelibly violated.

IV.

PLAINTIFF LANKFORD'S BOOKS AND MAGAZINES, SEIZED PURSUANT TO AN ILLEGAL AND OTHERWISE INVALIDATED SUBPOENA, MUST BE IMMEDIATELY RETURNED AND ANY PROSECUTION BASED UPON THEM, ENJOINED.

As stated in Part II, the original subpoena duces tecum in question requires the production of materials by Plaintiff that could result in Plaintiffs' criminal prosecution as a result of the Special Grand Jury's investigation of "criminal activity". Resultingly, effecting the subpoena duces tecum in question would violate Plaintiffs' *Fifth Amendment* rights, and, as such, effect an unreasonable search and seizure under the *Fourth Amendment* to the *United States Constitution.*

Thus, the subpoenaes are, or should be, declared illegal and void and all materials seized pursuant to them should be returned immediately.

Likewise, as stated in Part III, the subpoenae duces tecum(s) require the production of a massive quantity of books without any showing of necessity or materiality, and also require the production of magazines and books that are presumptively protected under the *First Amendment.* Thus, the subpoena in question, per se, effects an unreasonable search and seizure and is illegal. All materials of Plaintiff Lankford pursuant to this illegal subpoena should be returned immediately.

Finally, the first subpoena duces tecum was declared invalid on June 30, 1981. However, materials seized, pursuant to that subpoena, were and are still being held. Thus, Plaintiff has, in effect, had materials seized from him by police officers without sanction of any subpoena or search warrant.

Resultingly, Plaintiff Lankford has been denied his constitutional right to be secure in person and effects against unreasonable searches and seizures under the *Fourth and Fourteenth Amendments.* These materials *must* be returned immediately to preclude further irreparable injury to Plaintiffs' constitutional rights against self-incrimination and to due process of law.

Furthermore, evidence obtained pursuant to the *per se* unreasonable search and seizure must be suppressed and any prosecution on the strength of this evidence enjoined, given that this evidence was illegally wrenched from Plaintiffs' possession.

Memorandum in Support of Motion for Temporary Restraining Order

V.

BY RELEASING RECORDS OF THEIR PROCEEDINGS PRIOR TO THE CONCLUSION OF THEIR INVESTIGATION, THE SPECIAL GRAND JURY HAS VIOLATED VA. CODE §19.2-212. RESULTINGLY, THIS INVESTIGATORY BODY SHOULD BE DISBANDED OR THEIR FURTHER PROCEEDINGS ENJOINED FOR WILLFULLY AND WANTONLY VIOLATING THE LAW OF ITS CREATION AND DENYING PLAINTIFFS DUE PROCESS AND EQUAL PROTECTION OF LAW.

Va. Code §19.2-212 states in part:

> "The notes, tapes and transcriptions of the reporter are for the sole use of the Special Grand Jury and the contents thereof shall not be divulged by anyone except as hereinafter provided. After the Special Grand Jury has completed its use of the said notes, tapes and transcriptions, the foreman shall cause them to be sealed, the container dated and divulged to the Court.
>
> The Court shall cause the sealed container to be kept safely. If any witness testifying before the Special Grand Jury is prosecuted for perjury, the Court, on motion of either the attorney for the Commonwealth or the Defendant, shall permit them both to have access to the testimony given by the Defendant when a witness before the Special Grand Jury and the said testimony shall be admissible in the perjury case."

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Plaintiffs have not subsequently been prosecuted for perjury. And yet, when asked by counsel for Plaintiffs how the Special Grand Jury forwarded its questions for Plaintiffs to the Court, the Deputy Commonwealth Attorney, Mr. Gregory Welsh, replied:

> "I asked the Special Grand Jury for a list of questions they would like asked so you can rule on them. *I was given a copy of the transcript* (from the May 29, 1981 hearing before the Special Grand Jury) with questions marked and from that, my secretary typed the questions as the Special Grand Jury requested, and then I forwarded them on to the Court and counsel. . ."

(emphasis mine). *Transcript 2 (p. 14).* By releasing the transcript of the procedure to the Commonwealth's Attorney, before the Special Grand Jury without court order and prior to the conclusion of its investigation, the Special Grand Jury violated mandatory provisions of Va. Code §19.2-212.

Moreover, the Special Grand Jury may have unwittingly turned over, to the state, evidence containing Plaintiffs' own testimony; evidence that may now lead to the Plaintiffs' prosecution. Provisions of Va. Code §19.2-212 were clearly designed to preclude the wholesale surrender of incriminating evidence produced before a Special Grand Jury for public inspection and possible criminal prosecution.

Judge Pollard ruled that the questions and statements before the Special Grand Jury properly were released, given the invalidation of the old subpoena and the belated voidness of proceedings under it. *Transcript 2, (p. 18).* However, those proceedings were, in fact, clearly not voided, or documentary

evidence of Plaintiff Lankford taken pursuant to these proceedings would have been immediately returned.

At any rate, even if the original subpoena in question is officially void, it does not logically follow that all proceedings of the Special Grand Jury ocurring concurrent with the voided subpoena are void. A Special Grand Jury does not proceed pursuant to a subpoena; a subpoena is issued pursuant to the purposes and designs of the Special Grand Jury. *Va. Code §19.2-208.* While Plaintiffs may have had the right not to testify under the original subpoena, as the original subpoena failed to give adequate notice that testimony would be requested, Plaintiffs waived that right as to any testimony they did, in fact, give. Plaintiffs had not, at that point, been ordered to answer any question put to them by the Special Grand Jury in a court of law. Until so ordered to answer, Plaintiffs answers cannot be characterized as given under compulsion.

Thus, the question, statements and answers still stand as part of the permanent record of the Special Grand Jury. This evidence cannot be struck or suppressed from the record by voiding the subpoena under which it was taken. Likewise, it cannot, and should not, be divulged in a manner clearly repugnant to the law of this Commonwealth. By so divulging this evidence, Plaintiffs have been denied equal protection and due process of law.

A Special Grand Jury, given to activities so permanently injurious and detrimental to Plaintiffs' constitutional rights, must clearly be enjoined from any further proceedings.

Memorandum in Support of Motion for Temporary Restraining Order

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND COMPLAINT FOR PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No.

THOMAS FLETCHER CRAIG, JR., et al.,

Plaintiffs

v.

SIDNEY BARNEY, et al.,

Defendants

Plaintiffs herein respectfully submit to this Honorable Court this Memorandum in Support of Motion For Temporary Restraining Order and Complaint For Preliminary Injunction heretofore filed with this Honorable Court.

I.

THIS COURT MAY ENJOIN THE ACTIONS OF A STATE PROSECUTION AND A SPECIAL GRAND JURY, NOTWITHSTANDING PRESENT CRIMINAL PROCESS IN THE STATE PROCEEDING

The doctrine of Younger v. Harris, 401 U.S. 37, precludes interventions by a federal court in an ongoing state criminal prosecution. However, *Younger* does not require a court to abstain in every case where state proceedings have been initiated.

> "If the court concludes that the procedural posture of the state criminal enforcement proceedings which the Plaintiff attacks have not advanced to the point that *Younger* applies (by the time that substantial federal proceedings on the merits of the federal Plaintiff's complaint have transpired), then the court must immediately decide the merits of the federal plaintiff's challenge to the actions of the defendants." *Sovreign News Co. v. Falke*, 448 F. Supp. 306 333 (1977). See *Steffel v. Thompson*, 419 U.S. 922, 930 (1975), *Wooley v. Maynard*, 430 U.S. 705, 711-713 (1977).

Thus, the procedural posture of the state criminal proceeding in question, or the state proceeding itself, must be of such a nature that "principles of equity, comity and federalism" are given "force." *Steffel v. Thompson*, 415 U.S. at 462, *Septum v. Keller*, 614 F. 2d 456, 460 (5th Cir. 1980).

A Grand Jury proceeding's nature is such that principles of comity may require abstention from any federal challenge to its bringing of an indictment against federal plaintiffs. *Sovreign News v. Falke*, 448 F. Supp. at 361.

However, a Special Grand Jury's proceedings do not invoke similar principles of comity. Only where "the state's enforcement activity approaches stages beyond the bare, investigation phase, and . . . the state's judicial institutions commence involvement in the enforcement action, [does the] state's legitimate governmental interest . . . attain sufficient magnitude to merit *Younger's* protection from federal intervention . . . " supra at p. 347. A Special Grand Jury's function is strictly limited to

investigating and making reports thereon concerning any condition which tends to promote criminal activity in the community or which indicates misfeasance of governmental authority. *Va. Code §19.2-191(2)*, referred to by *Va. Code §19.2-206(A) (B)*. While bills of indictment may follow as a result of the report of the Special Grand Jury, they must be prepared by the attorney for the Commonwealth and presented to a regular grand jury. *Va. Code §19.2-214*. Only a regular grand jury has the power to consider bills of indictment. *Va. Code §19.2-191(1)*.

The Special Grand Jury proceeding in question is a state proceeding in the "bare investigation" phase. As such, its proceedings are not afforded protections against federal intervention as embodied in *Younger v. Harris*.

It makes little difference that plaintiffs, on appeal in a state proceeding, may vindicate those constitutional rights which they now present to this court; absent a state enforcement action protected by *Younger*, this Court must intervene on the merits. "Younger principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. §1983 for an alleged deprivation of federal rights." *Wooley v. Maynard*, 430 U.S. at 710. Federal Courts cannot escape their duty to respect a suitor's choice of federal forum for the hearing and decision of his federal constitutional claims "merely because state courts also have the solemn responsibility, equally with the federal courts, to guard, enforce and protect every right granted or secured by the *Constitution of the United States*." *Robb v. Connolly*, 111 U.S. 624, 637 (1884), *Septum v. Keller*, 614 F. 2d at 460-461.

Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

II.

PLAINTIFFS CLAIMS FOR FEDERAL RELIEF SHOULD NOT BE PRECLUDED BY RES JUDICADA OR COLLATERAL ESTOPPEL

The doctrine of res judicada, or collateral estoppel, is briefly stated as thus:

> "A question of fact or legal right, once determined, may not be relitigated even if a later suit between the same parties states a different cause of action. *United States v. Munsingwear*, 340 U.S. 36. The preclusion doctrines will also operate against all claims that *could* have been asserted in the first action. *Johnson v. United States*, 576 F.2d 606, 611 (5th Cir. 1978). A consent judgment, such as that entered in *Sheffner*, may constitute a decision on the merits to which res judicada may attach. 1 B Moore's *Federal Practice* §0.409[5].

Gilbert v. Bagley, 492 F. Supp. 714, 740-741 (M.D. N.C. 1980). In the case at bar, neither questions of fact nor plaintiff's legal rights have been definitely determined to the extent that the preclusion doctrine would apply.

Primarily, while the Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia was presented with Plaintiffs' *First, Fourth* and *Fifth* Amendment claims, and may not have been persuaded by them with regard to the production of documents, he refused to *order* that the materials in question be produced as subpoenaed.

Rather, Judge Pollard merely upheld the validity of the subpoenaes. Transcript 2 (p. 10). This "ruling" is not the definitive type ruling that the preclusion doctrines contemplate. The rights in question must be *directly determined* to preclude for Plaintiffs' present claim. *United States v. Mumsingwear, Inc.*, 340 U.S. 36, 38.

Judge Pollard's decision can, at best, be characterized as interlocutory, with a final order pending Plaintiffs' refusal to produce materials on the date subpoenaed. Orders upholding summonses are not appealable as final judgments. *Roger's Adm'r v. Bertha Zinc Co.*, 1 Va. Dec. 827, 19 S.E. 782 (1894). As a general rule, interlocutory decrees are also not appealable. *Thrasher v. Lustig*, 204 Va. 399, 31 S.E. 2d 286 (1963). The preclusion doctrines of res judicada and collateral estoppel are not intended to prejudice the rights of parties "by a decision which in the statutory scheme was only preliminary." *United States v. Munsingwear, Inc.*, 340 U.S. at 40.

Additionally, for preclusion doctrines to apply, "the rights, questions or facts that are the substance of the claim must be distinctly put in issue." *Supra* at 38.

Judge Pollard never, in any hearing, upheld the "scope" of the subpoenaes as being reasonable.

Judge Pollard never considered Plaintiff Lankford's complaint alleging denial of due process by reason of denial of holding magazines and books under an invalidated subpoena. In fact, the substance of this complaint could not have been raised until after Judge Pollard fashioned his inconsistent decrees.

Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

Judge Pollard never ruled on the violation of Plaintiffs' rights to due process and equal protection of law effected by the release of questions and statements given at the Special Grand Jury proceeding, although these facts were made apparent to Judge Pollard by Plaintiffs' counsel.

Judge Pollard never ruled on whether the subpoenaes in question would or would not effect a "chill" on Plaintiffs' *First Amendment* rights although the facts and law substantiating this claim were made apparent to Judge Pollard by Plaintiffs' counsel.

Judge Pollard never considered the substance of Plaintiffs' claim alleging bad faith enforcement of the law.

Given that these claims were either not presented or not definitely ruled on by Judge Pollard, a hearing of Plaintiffs' claim in a federal forum should not be precluded, notwithstanding the prejudicial effect of Judge Pollard's ruling on these as yet unlitigated or undecided claims.

Respectfully submitted,

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Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

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MEMORANDUM PURSUANT TO LOCAL RULE 11(f)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA-RICHMOND DIVISION

CIVIL ACTION FILE NO.
81-0685-R

THOMAS FLETCHER CRAIG, JR. and ORRIN T. LANKFORD, are operators of Adult Book Stores that make available to the adult public, various reading materials, located in the City of Petersburg, Virginia.

This action is brought under First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The Court has jurisdiction under *28 U.S.C. 1331; 28 U.S.C. 1343; 42 U.S.C. 1983; 28 U.S.C. 2201 and 2202; 28 U.S.C. 1343, Subsection 4; 28 U.S.C. 2207; Article 3, Section 2 of the Constitution of the United States and Rule 57 of the Federal Rules of Civil Procedure.*

DEFENDANTS have filed a Motion to Dismiss Amended Complaint, and offer the following reasons why said Motion should be granted by this Court:

I.

THE CONCEPTS OF FEDERALISM AND THE FEDERAL POLICY AGAINST PIECEMEAL REVIEW PRECLUDE THE PLAINTIFFS FROM FEDERAL RELIEF.

While the doctrines of res judicata or collateral estoppel may be inapplicable to the case at bar, the concept of Federalism should preclude any Federal relief for the Plaintiffs at the present time.

Memorandum Pursuant to Local Rule 11(f)

In an action to enjoin a State official from testifying in a State criminal prosecution and State administrative proceeding against a Federal plaintiff, the Supreme Court reversed an injunction granted in the Lower court. *Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385 (1963).* The Plaintiff had been illegally detained, made an incriminating statement and had had evidence from his home seized illegally. The Court in its closing remarks, had this to say:

> The withholding of injunctive relief against this State official does not deprive respondent of the opportunity for Federal correction of any denial of Federal constitutional rights in the state proceedings. To the extent that such rights have been violated, c.f., e.g. *Mapp v. Ohio, supra,* he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claim to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated Federal policy against piecemeal review, at 390.

The Court further stated that "such direct intrusion in state processes does not comport with proper Federal-state relationships" CLEARY at 390. Since Judge Pollard has yet to issue his final order, any Federal equitable intervention would be premature and would violate the Federal policy against piecemeal review. For these reasons, the Plaintiffs claims in a Federal Forum should be precluded.

RESPECTFULLY,

SIDNEY BARNEY,
GREGORY WELSH,

Memorandum Pursuant to Local Rule 11(f)

PHILLIP R. BROOKS
SEYMOUR BATES,
ALVIN SHEFFIELD,
CARLISS A. BATTS,
ESTELLE G. EVANS,
WILLIAM F. McCOY,
ELBERT L. PUGH,

By: Sidney Barney
Counsel

Sidney Barney,
Commonwealth's Attorney,
Courthouse Hill,
Petersburg, Virginia,
23803 =
4588

CERTIFICATE

I hereby certify that I have this 13th day of August, 1981, mailed a copy of the foregoing Memorandum to Burton W. Sandler, Esquire, Suite 600, 28 Allegheny Ave., Towson, Maryland, 21204; Clarence B. Neblett, Jr., Esquire, 5905 W. Broad Street, Richmond, Virginia, 23230, and Lawrence E. Blake, Esquire, Route 106, Prince George, Virginia, 23875.

s/ Sidney Barney
COUNSEL.

Memorandum Pursuant to Local Rule 11(f)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION
NO: 81-0685-R

THOMAS F. CRAIG, JR., et al

v.

SIDNEY BARNEY, et al

O R D E R

In accordance with the memorandum this day filed, defendants' Motion to dismiss the Amended Complaint is GRANTED.

And it is so ORDERED.

s/ D. Dortch Warriner
United States District Judge

Date: 16 September 1981

MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION
NO: 81-0685-R

THOMAS F. CRAIG, JR., et al

v.

SIDNEY BARNEY, et al

On 21 July 1981, plaintiffs filed a Motion for a temporary restraining order enjoining State special grand jury proceedings. A hearing was held on the Motion on 24 July. The Motion was denied. On 6 August, plaintiffs filed an Amended Complaint for a preliminary injunction. Defendants filed a Motion to dismiss on 13 August, and plaintiffs responded on 26 August. No rebuttal was filed, and the Motion is ripe for consideration.

Plaintiffs operate so-called "adult book stores" in Petersburg, Virginia. A State special grand jury was impaneled to investigate alleged prostitution in these bookstores. The foreman of the special grand jury summoned the plaintiffs to appear before the special grand jury and to produce various books and records. Plaintiffs filed in the supervising State court a Motion to quash the subpoenae. At a 22 June 1981 hearing on the Motion to quash, the Honorable Oliver A. Pollard, Jr., of the Circuit Court of the City of Petersburg ruled that plaintiffs could not be compelled to testify under the subpoenae because the subpoenae failed to provide adequate notice. Judge Pollard upheld the validity of the subpoenae insofar as they compelled the production of certain

books and records. At a subsequent hearing on 30 June, plaintiffs were ordered to answer certain questions before the special grand jury, such questions being found not to violate plaintiff's First, Fourth, Fifth and Fourteenth Amendment rights. Plaintiffs then filed their joint Complaint and Motion for relief in this Court.

In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that a federal district court should not intervene in a pending State criminal proceeding. Younger is based on

> the notion of "comity," that is, a proper respect for State functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

In Sovereign News v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), the District Court faced with an almost identical question as is presented to me, ruled that the Younger doctrine requires abstention in an action to interfere by injunction with State grand jury proceedings. The Court reasoned that a grand jury proceeding involves important State interests which evoke the notions of comity and federalism expressed in Younger. While this Court recognizes differences between the grand jury in Falke and the special grand jury here,[1] the differences are not such as would

---

1. Among other things, a Virginia special grand jury cannot hand down an indictment. It may file a report to the court recommending the presentation of its findings to a regular grand jury. Va. Code §§19.2-213 to -214 (1975).

vitiate Younger consideration. The reason for Younger abstention is wholly applicable here. The special grand jury is seeking to ferret out for prospective punishment prostitution in pornography parlors — criminal activity wholly within the appropriate concerns of a State.

Despite such clear applicability, the Younger doctrine is inappropriate if the Complaint adequately alleges bad faith or harassment by the State government. 401 U.S. at 48-49. Plaintiffs here alleges in conclusory terms that the defendants, being the members of the special grand jury, attorney for the Commonwealth for the City of Petersburg, and an assistant Commonwealth's attorney, are using the subpoena mechanism of the special grand jury to harass plaintiffs into closing their stores, thus engaging in bad faith enforcement of the law. The facts alleged do not indicate harassment or bad faith. Indeed, everything done or sought to be done by defendants has been subjected to impartial judicial scrutiny, and it conclusively appears from the Amended Complaint that plaintiffs have had a full and complete opportunity to contest each aspect of the special grand jury action before an impartial tribunal. Ritualistic imprecation of the words "harassment" and "bad faith" will not save an otherwise defective Complaint.

Plaintiffs' claims of a violation of due process are likewise without substance. The Amended Complaint makes clear that, whatever the correctness of the State court's decision, plaintiffs were fully heard by a court with jurisdiction to hear and decide the issues.

A further word; although the defendants were clearly invited by this Court at the 24 July hearing to plead *res judicata*, they did not do so. Indeed, without explanation they conceded that

"the doctrine of *res judicata*. . .may be inapplicable to the case at bar." In the absence of an adversary presentation on this issue, this Court's view is uninformed; but a review of the proceedings before Judge Pollard on 22 June and 30 June shows that he was asked to rule and did rule on the very issues presented to this Court. Counsel for plaintiffs here acknowledged as much in his argument. Plaintiffs, claiming some procedural bar to an appeal to the Virginia Supreme Court, have in effect appealed Judge Pollard's ruling to this Court. This Court has no appellate jurisdiction from the Circuit Courts of the Commonwealth.

The Motion to dismiss the Amended Complaint will be GRANTED and an appropriate order shall issue.

s/ D. Dortch Warriner
United States District Judge

Date: 16 September 1981

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

* * *

[54]THE COURT: Gentlemen, just to resume, to give in a resume form what I feel about this situation, ruling or whatever, it is my opinion the subpoena was properly issued by the foreman of the Grand Jury, and I cite 19.2-208, Davis v. Commonwealth. As to whether the subpoena called for testimony by a witness, I have some reservation about that. In Rule 3(A):15 I believe it is required that the subpoena specifically state that the witness was called upon to testify. For the purposes of going beyond this, it is a simple matter for the State to have new subpoenas issued. We can go on to discuss the questions or not, or if it is opposed by counsel for the petitioner I think that would have to be postponed. In my opinion the subpoena for the documents involved is valid and stands at this point.

As I just alluded to, I think it is insufficient to require the witnesses to testify, but where this leaves us I don't know since apparently they didn't testify anyway.

MR. SANDLER: There was some testimony.

THE COURT: Did anybody testify?

MR. SANDLER: Yes, sir, there was some testimony.

THE COURT: By your client?

[58] witnesses will relate to the individual copies of the books—if the motions and delays that have been necessitated by these hearings and the memorandums, and so forth—if that has delayed the Grand Jurors' questioning individual witnesses relating to individual issues, then there is no problem because— See what I'm saying?

MR. SANDLER: Yes, sir.

THE COURT: I don't know if that is the case.

MR. SANDLER: At this point we are not prepared to discuss that.

THE COURT: That is what I'm saying.

MR. SANDLER: Yes, sir. Do I understand you are of the opinion, Your Honor, with your permission, that the request for production of unspecified copies, just one copy of everything in the store, is proper under the subpoena?

THE COURT: I think it is proper as long as it is not held for an unreasonable period of time.

MR. SANDLER: Okay.

THE COURT: Unless it is some showing from beyond a certain point they are related to the Grand Jury proceedings and questioning of witnesses—

MR. SANDLER: You haven't made a final ruling. . . .

[12] application the subpoena was issued.

Now, Your Honor, Section (b) deals with the subpoenas for production of documentary evidence and objects, and that goes on to say a subpoena when authorized by a Court order may also command the person summoned thereby to produce writings or objects described in the subpoena, and it goes on further to talk about notice and hearing.

Excerpts of Transcript of Proceedings

Your Honor, the subpoena in this particular matter before the Court was directed to Thomas Fletcher Craig, Jr., and the other petitioner Lankford, or designated manager. It is not directed to an officer of the corporation. It is not directed to a resident or registered agent. It is directed towards an individual and/or manager, obviously of some business establishment. It does not anywhere on its face imply or indicate that it's directed toward a corporate officer or custodian of records of the corporation, and I respectfully submit that the subpoena on its face does not deal with a corporate entity or corporate individuals, but with an individual or a designated manager. It's in the disjunctive, Your Honor, and not in the conjunctive. Nevertheless, Your Honor, the subpoena is signed by the foreman of a Special Grand Jury, and it directs the. . . .

[18]MR. SANDLER: The contents of the transcript of the Special Grand Jury is not supposed to be divulged by anyone until it has completed its investigation and sealed, and it is supposed to be submitted to the Court in a sealed fashion.

THE COURT: I have ruled, have I not, that the subpoena was invalid. Therefore, the questions in the proceedings before the Grand Jury pursuant to that invalid subpoena are therefore now void to an extent. Therefore, I don't think I'm divulging anything, and I'm handling this on a matter to save you time and me time, as long as everybody in here is in here connected with this Grand Jury proceeding, with the exception of Mr. Parrish, the Clerk, and Mr. Dunn. And I can ask them to step out.

MR. SANDLER: I have the greatest respect for your ruling.

THE COURT: I don't want to waste your time and everybody's time.

Excerpts of Transcript of Proceedings

Ask Mr. Craig the question. I refuse to answer it. Get Judge Pollard. Go back—

MR. SANDLER: I agree.

THE COURT: I think it is an exercise in futility. I agree with you technically but practically I. . . .

[10]THE COURT: The Court hasn't ordered any production of documents. The Court has sustained the validity of the subpoena issued by the Special Grand Jury. There is a difference.

MR. SANDLER: Fine. I just wanted to have a line of communication with the Court. Thank you, Your Honor.

THE COURT: Do we have anything else or do you want to go through these questions? Quite frankly, I think the ruling on them is pretty obvious. I think they are entitled to the Fifth Amendment if you want on quite a few of them. Some should be answered. Assuming the subpoena will be issued, we have to go on the assumption rather than have you back down here every two or three days. We are trying to do it this way to save time.

MR. WELSH: Judge, the subpoena should be ready now. If you would like, it may help—

THE COURT: You see, the terms of the subpoena, Mr. Welsh, insofar as personal appearance to testify shouldn't be any problem.

MR. WELSH: The only way the subpoena differs from the original subpoena is that it says to testify and to produce, and of course in Mr. Lankford's case it leaves out paragraph (D) since he had already complied. . . .

• • •

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment — United States Constitution

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fifth Amendment — United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Section I, Fourteenth Amendment — United States Constitution

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Fourth Amendment — United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. Code of Virginia

"§19.2-207. Composition of a special grand jury.—Special grand juries shall consist of not less than seven and not more than eleven members, and shall be summoned from a list prepared by the court. Members of a special grand jury shall possess the same qualifications as those prescribed for members of a regular grand jury. The court shall appoint one of the members as foreman. (1975, c. 495.)

§19.2-208. Subpoena power of special grand jury.—The special grand jury may subpoena persons to appear before it to testify and to produce specified records, papers and documents, but before any witness testifies, he shall be warned

by the foreman that he need not answer any questions or produce any evidence that would tend to incriminate him, and that the witness may have counsel of his own procurement present when he appears to testify, and at the same time the foreman also shall warn each witness that he may later be called upon to testify in any case that might grow out of the investigation and report of the special grand jury. Notwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable.

The foreman shall administer the oath prescribed by law for witnesses, and any member of the special grand jury may examine a witness. (1975, c. 495.)

§19.2-212. Provision for court reporter; use and disposition of notes, tapes and transcriptions.—A court reporter shall be provided for a special grand jury to record, manually or electronically, and transcribe all oral testimony taken before a special grand jury, but such reporter shall not be present during any stage of its deliberations. The notes, tapes and transcriptions of the reporter are for the sole use of the special grand jury, and the contents thereof shall not be divulged by anyone except as hereinafter provided. After the special grand jury has completed its use of the said notes, tapes and transcriptions, the foreman shall cause them to be sealed, the container dated, and delivered to the courts.

The court shall cause the sealed container to be kept safely. If any witness testifying before the special grand jury is prosecuted subsequently for perjury the court, on motion of either the attorney for the Commonwealth or the defendant, shall permit them both to have access to the testimony given by the defendant when a witness before the special grand jury, and the said testimony shall be admissible in the perjury case.

If no prosecution for perjury is instituted within three years from the date of the report of the special grand jury, the court shall cause the sealed container to be destroyed. (1975, c. 495.)

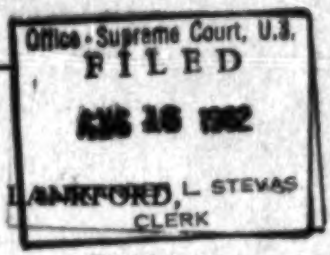
§19.2-213. Report by special grand jury.—At the conclusion of its investigation and deliberation, the special grand jury shall file a report of its findings with the court, including therein any recommendations that it may deem appropriate, after which it shall be discharged. (1975, c. 495.)

§19.2-214. Prosecutions resulting from report.—Any bill of indictment for alleged criminal offenses, which may follow as a result of the report of the special grand jury, shall be prepared by the attorney for the Commonwealth for presentation to a regular grand jury. (1975, c. 495.)"

No. 82-73

In The

Supreme Court of the United States



October Term, 1982

THOMAS CRAIG, JR. and ORRIN T. LANKFORD,

Petitioners,

vs.

SIDNEY BARNEY, Commonwealth's Attorney, City of Petersburg; GREGORY WELSH, Deputy Commonwealth's Attorney; PHILLIP R. BROOKS, SEYMOUR BATES, ALVIN SHEFFIELD, CARLISS A. BATTS, ESTELLE G. EVANS, WILLIAM F. McCOY, ELBERT L. PUGH, Special Grand Jury Members,

Respondents.

BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether federal courts should abstain from exercising jurisdiction when asked to enjoin pending State Special Grand Jury proceedings.

2. Whether res judicata and collateral estoppel precluded the lower courts from reaching the merits of this case.

3. Whether the Special Grand Jury's exercise of its statutory subpoena powers violated the petitioners' First Amendment rights.

4. Whether the subpoenas issued by the Special Grand Jury were violative of the petitioners' Fifth Amendment rights.

5. Whether issuance of the Special Grand Jury subpoenas violated petitioners' due process rights.

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No.

In The

Supreme Court of the United States

October Term, 1982

THOMAS CRAIG, JR. and ORRIN T. LANKFORD,

Petitioners,

vs.

SIDNEY BARNEY, Commonwealth's Attorney, City of Petersburg; GREGORY WELSH, Deputy Commonwealth's Attorney; PHILLIP R. BROOKS, SEYMOUR BATES, ALVIN SHEFFIELD, CARLISS A. BATTS, ESTELLE G. EVANS, WILLIAM F. McCOY, ELBERT L. PUGH, Special Grand Jury Members,

Respondents.

BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

On May 20, 1982, the United States Court of Appeals for the Fourth Circuit filed a published opinion affirming the decision of the United States District Court for the Eastern District of

Virginia, at Richmond; the Honorable D. Dortch Warriner, District Judge presiding, abstaining from the consideration of the merits under the *Younger v. Harris* doctrine. The Court of Appeals found that the doctrine of federal abstention espoused in *Younger v. Harris* was applicable to the case and that Virginia's interest in the unfettered operation of its grand jury system was an important state interest outweighing the alleged constitutional violations asserted by the petitioners. The Court of Appeals, therefore, did not reach the merits of the case.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered May 20, 1982, and that judgment is final. Jurisdiction of this Court has been invoked under Title 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution and the provisions of Virginia Code Annotated §§19.2-207, 208, 212, 213, 214 have been set forth in petitioners' appendix.

STATEMENT OF THE CASE

On April 17, 1981, at the request of the Regular Grand Jury, the Honorable Oliver A. Pollard, Circuit Court Judge for the City of Petersburg, impaneled a Special Grand Jury for the April Term. Its purpose was to investigate and report to the Court any condition which tended to promote criminal activity in Petersburg Adult Book Stores. As the respondents have maintained from the outset, this particular Special Grand Jury was not impaneled solely to investigate the narrow area of prostitution. Rather,

alleged prostitution and possible tax evasion violations were only several of numerous areas in which the Special Grand Jury was interested.

On May 22, 1981, the foreman of the Special Grand Jury, pursuant to Va. Code Ann. §19.2-208, issued subpoenas requiring the petitioners to appear before the Special Grand Jury with books, documents and magazines on May 29, 1981. In reference to these subpoenas, the Deputy Commonwealth's Attorney for the City of Petersburg, Virginia wrote the petitioners advising them that their testimony at the Special Grand Jury proceeding could neither be disclosed nor used against them, absent a prosecution for perjury. Pursuant to his subpoena, petitioner Lankford surrendered publications that had been previously inventoried. Petitioner Craig, however, refused to surrender any material, claiming that his First, Fourth, Fifth and Fourteenth Amendment rights had been violated.

On May 29, 1981, at a Special Grand Jury hearing in the Circuit Court of Petersburg, the Honorable Oliver A. Pollard, Jr., ruled that the petitioners were required to appear before the Special Grand Jury as subpoenaed. At this special hearing, the petitioners filed a motion to quash the subpoenas. The Honorable Oliver A. Pollard, Jr. set a hearing for this motion on June 22, 1981.

At the hearing on June 22, 1981, where the petitioners' motion to quash was duly considered, the Honorable Oliver A. Pollard, Jr. ruled that the petitioners could not be compelled to testify under the subpoenas as they failed to provide the petitioners with adequate notice that testimony would be required of them. He also upheld the validity of the subpoenas, insofar as they required the production of documents and magazines.[1] In this hearing the

1. Petersburg Transcript, June 22, 1981, p. 54.

Petersburg Circuit Court scheduled another hearing for June 30, 1981, at which time the Special Grand Jury would submit questions that it intended to ask the petitioners. The Court would then rule whether or not the petitioners could assert their Fifth Amendment rights to any or all of these questions.

On June 30, 1981, the Honorable Oliver A. Pollard, Jr., ruled separately on whether or not any of the proposed questions would violate the petitioners' First, Fourth, Fifth and Fourteenth Amendment rights. Also at this hearing the State Circuit Court Judge again upheld the validity of a portion of the subpoenas.[2] Apparently, however, the petitioners are confused on this point, as they state on the fifth page of the petition that the Court "ruled . . . that the subpoena was invalid". As has been previously alluded to, a complete reading of this transcript[3] reveals that Judge Pollard only reiterated his earlier ruling that questions asked pursuant to the subpoenas were void, as they gave inadequate notice to compel testimony. The subpoenas, however, had already been held to be valid as far as they pertained to the production of books and documents.[4] Also illuminating is the following exchange from the hearing of June 30, 1981:

> "MR. SANDLER: What I'm referring to is the fact that there is a subpoena to produce an object, and if we are ordered by the Court to produce those objects the production of the objects

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2. Petersburg Transcript, June 30, 1981, p. 10.

3. *Id.*, p. 18.

4. Petersburg Transcript, June 22, 1981, p. 54.

in themselves could result in the possible prosecution of the individual who produces them.

THE COURT: The Court hasn't ordered any production of documents. The Court has sustained the validity of the subpoena issued by the Special Grand Jury. There is a difference." pp. 9-10.

Since the first subpoenas were invalid as they applied to the compelling of testimony, both petitioners Craig and Lankford were issued new subpoenas on July 9, 1981. As has been noted, petitioner Lankford was not required to produce documents or magazines under his second subpoena, as he had already complied with the valid portion of the original subpoena. Petitioner Craig however, ignored his original subpoena, and was required to produce documents and magazines in addition to providing testimony.

On July 21, 1981, ten days before the petitioners were to answer questions pursuant to their July 9, 1981, subpoenas, they filed a motion for a 42 U.S.C. §1983 action. With this, they included a request for a temporary restraining order, enjoining the State Special Grand Jury proceedings. The motion was denied in the United States District Court for the Eastern District of Virginia on July 24, 1981. The appellants subsequently filed an amended complaint for a preliminary injunction on August 6, 1981, which was answered by appellees' motion to dismiss the amended complaint on August 13, 1981. This motion to dismiss was granted on September 16, 1981, and an appeal was filed by petitioners in the United States Court of Appeals for the Fourth Circuit on November 20, 1981.

Oral argument before the Court of Appeals was held on March 3, 1982. The Court of Appeals rendered its decision on May 20, 1982 affirming the decision of the United States District

Court for the Eastern District of Virginia to abstain under the doctrine of *Younger v. Harris*. A petition for writ of certiorari was subsequently filed with this Honorable Court, with this brief in opposition addressed thereto.

HOW THE FEDERAL QUESTIONS WERE RAISED

The petitioners raised First, Fourth, Fifth and Fourteenth Amendment issues in state court and in the lower federal courts in an attempt to frustrate the legitimate functions served by a Special Grand Jury in Virginia.

REASONS FOR DENYING THE WRIT

The petition submitted poses no novel or important questions and implicitly asks that this Court's holding in *Younger v. Harris* be reversed.

I.

Federal courts should abstain from exercising jurisdiction when asked to enjoin pending State Special Grand Jury proceedings.

The petitioners have in essence, claimed an immediate and unrestricted right to have their constitutional questions decided by a federal forum while state proceedings are pending. In support of this theory they first cite *Patsy v. Florida Board of Regents*, No. 80-1874, 50 L.W. 4731 (1982), for the proposition that exhaustion of state administrative remedies is not a condition precedent to bringing an action under 42 U.S.C. §1983. This case of course, did not involve any pending state proceedings and only reinforces earlier decisions of this Court. *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433 (1963).

In situations where state proceedings are in progress when federal injunctive relief is requested the decisions of this Court have been quite different. In *Huffman v. Pursue*, 420 U.S. 592, 95 S. Ct. 1200 (1975), the appellee had taken over operation of a theater displaying allegedly obscene movies just prior to the appellants obtaining an Ohio civil judgment, ordering closure of the theater and seizure and sale of personal property used in its operation. Instead of appealing the judgment in the state system, the appellant immediately filed suit in federal district court under 42 U.S.C. §1983, seeking injunctive and declaratory relief against alleged deprivations of his constitutional rights. After some discussion as to when the state court judgment became final, this Court noted the general exhaustion principle of long standing:

> "For regardless of when the Court of Common Pleas judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*." at 608.

The petitioners next allege that applying the principle espoused in *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211 (1977) to the instant case is contrary to the legislative intent of 42 U.S.C. §1983, and that they have not had an opportunity to present their federal claims in the state proceedings. Both allegations are wanting in merit. In *Vail*, the appellees were held in contempt for disobeying subpoenas to appear in supplemental proceedings brought by judgment creditors. There, the appellees did not appear in any of the New York courts to raise their constitutional claims. In holding that an opportunity to present federal claims in a state proceeding is all that is required to invoke abstention, this Court first noted:

> "The contentions made before the District Court, however, could have been raised by appellees in the state courts as a defense to the ongoing proceedings. Had the County Court ruled against these contentions, appellees could have appealed to the Appellate Division of the Supreme Court. They chose, by resorting to the federal courts, not to avail themselves of this forum afforded by the State of New York." at 330.

Petitioners in the case at bar were actually present in state court on several occasions to raise issues that were again raised in federal district court. They were, therefore, never in the position of being placed between "the Scylla of intentionally flouting state law and the Charydbis of foregoing what [they] believe to be constitutionally protected activity. . . ." *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974). The fact that their motion to quash was denied does not of course, indicate that they were not given ample opportunity to present federal issues in a Virginia forum. They should have appealed the denial of their motion to quash to the Supreme Court of Virginia. *N.A.A.C.P. v. Committee*, 199 Va. 665, 101 S.E. 2d 631 (1958). Even assuming arguendo, that petitioners were found guilty of contempt subsequent to failing to note an appeal of the denial of their motion to quash they like the appellees in *Vail*, could have appealed this decision to a higher state court. *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E. 2d 352 (1943).

It is also apparent that the legislative intent of 42 U.S.C. §1983 and the holdings of *Vail* and other *Younger* progeny are not in conflict. *Vail* of course, examined the substantiality of a state's interest in operating its own civil and criminal enforcement institutions without interference from federal district courts. In noting the broad scope of *Younger* this Court held that *Younger* and *Huffman* principles were not confined solely to the types of

state actions which were sought to be enjoined in those cases. *Vail* at 334.

In *Stefanelli v. Minard*, 342 U.S. 117, 72 S. Ct. 118 (1951), this Court had an opportunity to reiterate its construction of 8 U.S.C. §43, now 42 U.S.C. §1983. There the petitioner asked a federal district court to enjoin the use of illegally seized evidence in a state criminal trial. This Court stated:

> "Regardless of the differences in particular cases, however, this Court's lodestar adjudication has been that the statute 'should be construed so as to respect the proper balance between the states and the federal government in law enforcement.' *Screws v. United States*, 325 U.S. 91, 108, 65 S. Ct. 1031, 1039, 89 L. Ed. 1495. Only last term we reiterated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to upset the federal system.' " *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 940 (1951) at 121.

It should also be noted that a federal district court's decision to abstain should not be overturned on appellate review unless its action constituted an abuse of discretion. *Public Citizen Health Research Group v. Commission on Medical Discipline of Maryland*, 573 F. 2d 863, 866 (4th Cir. 1978); *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S. Ct. 1316, 1324 (1964). Since the petitioners failed to demonstrate any abuse of discretion, the Court of Appeals correctly affirmed the decision below.

II.

The doctrines of res judicata and collateral estoppel precluded the lower courts from reaching the merits of this case.

The petitioners have offered an incomplete definition of res judicata that conveniently ignores situations where an issue could have been litigated in a given forum. Also absent is any explanation of the related doctrine of collateral estoppel. In *Allen v. McCurry*, ____ U.S. ____, 101 S. Ct. 411, 414 (1980), this Court succinctly defined and elaborated upon both concepts:

> "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised on that action. *Crowell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210. As this court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits conserve judicial resources and by preventing inconsistent decisions." at 414.

Apparently, the petitioners have advanced two reasons why the doctrines of res judicata and collateral estoppel should not apply to the case at bar. On the twelfth page of their petition they claim that distinctly different issues are involved in attempting to quash a subpoena in state court and seeking declaratory and injunctive relief in federal court. The petitioners next allege that

their constitutional issues were not directly determined as the state court "merely upheld the validity of the issued subpoenas without comment as to the constitutional claims attempted to be raised."[5] Through this line of reasoning petitioners implicitly conclude that the state court's decision upholding the validity of the subpoenas was interlocutory and as such, not a final judgment for res judicata purposes.

In relation to their first argument challenging the identity of issues, petitioners by their own admission noted that ". . . while the Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia was presented with plaintiffs' First, Fourth and Fifth Amendment claims, and may not have been persuaded by them with regard to the production of documents, he refused to order that the materials in question be produced as subpoenaed."[6] These are of course, the precise claims that the petitioners attempted to relitigate in federal court. It is further submitted that the petitioners have in effect, attempted to abolish the res judicata doctrine by claiming that it has no application where issues are decided adversely to litigants. At the hearing before the federal district court on July 24, 1981, counsel for the petitioners stated:

> "And the reason we're here, Your Honor, to be very frank with you, is because we have gotten some relief through the Circuit Court in Petersburg. But the rulings in connection with the production of material that's presumptively protected by the first amendment has been adverse

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5. Petition for Writ of Certiorari, p. 12, footnote 6.

6. *Id.* at p. 46a.

> to us and we can't appeal it *because it's an interlocutory* order."[7]

The petitioners in support of their second argument, characterize the state court's denial of their motion to quash as interlocutory and cite *Alexander v. United States,* 201 U.S. 117, 26 S. Ct. 356 (1906), for this proposition. This case involved a federal circuit court's order directing witnesses to answer questions and produce written documents before a special examiner investigating antitrust violations. Virginia law however, is more permissive and applicable to the case at bar. *N.A.A.C.P. v. Committee,* 199 Va. 665, 101 S.E. 2d 631 (1958). There a joint committee of the State Legislature was charged with the responsibility of determining whether laws of the Commonwealth of Virginia relating to the administration of justice were being administered. Like the Special Grand Jury in the case at bar, the committee had investigative duties that sometimes mandated the issuance of subpoenas. The N.A.A.C.P. was issued two subpoenas, one in February of 1957 requesting the names and addresses of its principal officers and its expenditures, and another in March, 1957, seeking similar and additional information. On the first page of its opinion, the Supreme Court of Virginia writing through Justice Eggleston stated:

> "This writ of error was granted to review an order denying a motion to quash and dismiss two subpoenas which had been issued pursuant to the orders of the court below upon the ex parte motions of a joint legislative committee created by an Act of the General Assembly (Acts 1956, Ex. Sess. Ch. 34, p. 35)." *N.A.A.C.P.* at 667.

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7. Federal District Court Transcript, July 24, 1981, pp. 6-7.

The respondents would submit that the state court's ruling denying petitioners' motion to quash and upholding the validity of the subpoenas was similarly a final judgment. Therefore, the petitioners were precluded by the related doctrines of res judicata and collateral estoppel from asserting their claims in federal court. Their proper course should have been an appeal of the denial of their motion to quash to the Supreme Court of Virginia. In bypassing this necessary step, they have in essence, attempted to appeal a Virginia Circuit Court decision to federal court. Clearly, the federal district court below had no appellate jurisdiction from state courts.

III.

The Special Grand Jury's exercise of its statutory subpoena powers did not violate petitioners' First Amendment rights.

The petitioners have cited numerous cases to support their position that bookstores presumptively enjoy First Amendment protection. Nevertheless, the respondents would urge this Court not to extend the holdings of these cases to the current factual situation which does not involve either the introduction of evidence in a criminal trial or the suppression and return of evidence seized under a constitutionally infirm search warrant. Again, the petitioners have wrongfully alleged that the subpoenas issued on May 22, 1982 were subsequently held invalid on June 22, 1981.[8] The respondents would reiterate that these subpoenas were held invalid only insofar as they required testimony. The Honorable Oliver A. Pollard, Jr., did however, sustain the validity of the portion of the subpoenas requiring the production of books and documents.

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8. Petition for Writ of Certiorari, p. 14, footnote 8.

The petitioners next allege that since the materials subpoenaed are presumptively protected by the First Amendment, they must before seizure, be proven at a prior adversarial hearing to be obscene. In response, the respondents would submit this Court's position relating to the administration and enforcement of a state's criminal laws. In *Perez v. Ledesma,* 401 U.S. 82, 91 S. Ct. 674 (1971), the plaintiff operated a newstand that sold allegedly obscene books, magazines and playing cards. After some of these items were seized, the plaintiff filed suit in the United States District Court for the Eastern District of Louisiana. There a three-judge court found that the articles had been illegally seized, as there had been no prior adversary hearing on the character of the seized materials. The Court then entered a suppression order, requiring the return of the seized materials to the plaintiffs. In reversing the lower court's order, this Court referred to *Stefanelli v. Minard,* 342 U.S. 117, 72 S. Ct. 118 (1951) and stated:

> "Here Ledesma was free to present his federal constitutional claims concerning his arrest and seizure of materials or other matters to the Louisiana courts in the matter permitted in that State. Only in cases of proven harrassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury is shown is Federal injunctive relief against pending state prosecutions appropriate. There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good faith attempt to enforce the State's criminal laws. We therefore hold that the three-judges court improperly intruded into the state's own criminal process and reverse its order suppressing evidence

> in the pending state prosecution and directing the return of all seized materials." at 85.

The petitioners have also alleged in conclusory terms that the Special Grand Jury has "chilled" the excercise of their First Amendment rights by casting suspicion upon the material subpoenaed. They of course, have not even been indicted and claim no substantial business losses as a result of the Special Grand Jury's investigation. In *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318 (1972), this Court noted:

> "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm: 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' " *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89, 67 S. Ct. 556, 564, 91 L. Ed. 754 (1947). at 13-14.

In the instant case the respondents were interested only in the fair investigation and enforcement of the criminal laws of the State of Virginia. While petitioners' claims are phrased in language common to the case allowing federal equitable intervention, they have failed to show any of the special circumstances that must first be established. *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974).

IV.

The subpoenas issued by the Special Grand Jury were not violative of petitioners' Fifth Amendment rights.

In *United States v. Mandujano*, 425 U.S. 564, 96 S. Ct. 1768 (1976), this Court noted the function of a grand jury and further commented upon its summoning of witnesses:

> "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations of crime to call before it persons suspected of criminal activity, so that the investigation can be complete. This is true whether the grand jury embarks upon an inquiry focused upon individuals suspected of wrongdoing, or is directed at persons suspected of no misconduct but who may be able to provide links in a chain of evidence relating to criminal conduct of others or is centered upon broader problems of concern to society. It is entirely appropriate — indeed imperative — to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime." at 573.

The petitioners in the instant case have completely disregarded the very nature of a Virginia Special Grand Jury subpoena, and have instead, assumed that evidence is being improperly secured for use in future criminal trials against them. A close examination of Virginia's statutory scheme reveals that this assumption is without foundation.

The function of a Virginia Special Grand Jury is limited to investigating and making a report concerning any condition which involves or tends to promote criminal activity, either in the community or by any governmental authority, agency or official thereof. Va. Code Ann. §19.2-191(2). Every member of a Special Grand Jury is required to keep secret all proceedings. Va. Code Ann. §19.2-192. The Special Grand Jury may subpoena witnesses and specified records, papers and documents, and the foreman must warn each witness that he need not answer any questions or produce any documents that would tend to incriminate him and that he may have counsel present when he appears to testify. Va. Code Ann. §19.2-208. The attorney for the Commonwealth

may be present during the investigatory state if requested by the Special Grand Jury and may also be present when legal advice is requested. Va. Code Ann. §19.2-210. All proceedings must be recorded and transcribed, but all notes and transcripts are for the sole use of the Special Grand Jury and must be sealed after the Special Grand Jury has completed its use of them. They can thereafter only be divulged on order of the court if a witness is charged with perjury before the Special Grand Jury. Va. Code Ann. §19.2-212. At the conclusion of its deliberation, the Special Grand Jury must file a report with the court, which can only be unsealed by court order. Va. Code Ann. §19.2-213.

Very clearly, a Virginia Special Grand Jury does not gather evidence for use in the regulation of any business. As has been noted, any evidence is sealed and can only be opened in the case of perjury on court order and its report can only be divulged on court order. Petitioners neither challenge the constitutionality of the statutes under which the subpoenas were issued, nor cite any cases which prohibit a Virginia Special Grand Jury from issuing subpoenas requiring witnesses to appear and present materials.

It should also be stressed that since the Special Grand Jury proceeding was not an obscenity trial, the material subpoenaed could not "speak for itself." For this reason, any alleged Fifth Amendment violations are at best, highly speculative. It is only speculation that the Special Grand Jury would refer any recommendations to the Regular Grand Jury for appropriate action, and it is likewise speculative to assume that the Regular Grand Jury, if presented with such recommendations, would decide to indict the petitioners. Furthermore, even if the petitioners were indicted in state court, any information obtained from the Special Grand Jury proceeding would be legally inadmissible at their trial. Again, it would be only speculative to assume that the Honorable Oliver A. Pollard, Jr., would incorrectly overrule

the petitioners' motion to suppress because he had "participated in the motion to quash the subpoena".[9] Therefore, given no evidence of any immediate irreparable injury, federal injunctive relief below would have amounted to an ongoing federal audit of state criminal proceedings. *O'Shea, supra,* at 500.

V.

The Special Grand Jury subpoenas did not violate the petitioners' due process rights under the Fourteenth Amendment.

The petitioners contend that a determination of obscenity by a detached magistrate as well as other procedural mandates affirmed by this Court were not followed in the case at bar. These requirements are however, totally inapplicable to the Special Grand Jury subpoenas in the instant case. As has been mentioned, these cases involve evidence that is improperly sought to be introduced at criminal trials or situations where items are seized pursuant to a constitutionally infirm search warrant.

In the case at bar, petitioners were given full opportunity in state court to show cause why they should not have produced the subpoenaed materials.[10] *Consolidated Rendering Co. v. Vermont,* 207 U.S. 541, 551, 28 S. Ct. 178 (1908). Therefore, they were provided with the due process safeguards they claim were lacking and the injunctive relief sought was correctly denied.

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9. Federal District Court Transcript, July 24, 1981, p. 21.

10. *See* Petersburg Transcripts, June 22, 1981 and June 30, 1981.

CONCLUSION

Petitioners have asked this Court to open the door to potentially unlimited federal intervention in state proceedings. For this and the foregoing reasons, it is respectfully requested that their petition for writ of certiorari be denied.

Respectfully submitted,

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